**U.S. Department of Labor**

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**Issue Date: 04 April 2006**

CASE NO.: 2005 STA 13

In the Matter of

KENNETH J. WENTWORTH
Complainant

v.

WE CARE TRANSPORTATION, LLC.
Respondent

Appearances: Mr. Charles Joseph, Attorney
Ms. Rebecca Height, Attorney
For the Complainant

Ms. Melissa A. Fingar, Attorney
Mr. Roy R. Galewski, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations ("C.F.R.") Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules.

## PROCEDURAL BACKGROUND

On December 23, 2004, after an investigation by the Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"), of Mr. Wentworth's allegation of illegal discrimination by We Care Transportation, LLC, ("We Care"), the Regional Administrator determined that Mr. Wentworth's protected activity under STAA was not a contributing factor in We Care's termination of employment as a truck driver. On January 21, 2005, Mr. Wentworth, through counsel, filed his exceptions to the adverse determination and requested a hearing with the Office of Administrative Law Judges. Pursuant to a Notice of

Hearing, dated January 27, 2005, I set a hearing date of February 15, 2005 for this case in Syracuse, New York (ALJ I).[1] After a series of continuances (ALJ II to IV), I conducted a hearing on May 4 and 5, 2005. Mr. Wentworth, his attorneys, Mr. Joseph and Ms. Height, and counsel for the Respondent, Ms. Fingar, were present at the hearing. My recommended decision and order in this case is based on the testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 8, CX 10, CX 11, CX 13 to CX 16, CX 20, CX 28 to CX 30, CX 32, CX 34, CX 39, CX 41 to CX 47,[2] CX 51 to CX 53, CX 55, and RX 1 to RX 4.[3] As I advised the parties (TR, page 372), I am also taking judicial notice of Title 17, New York Compilation of Rules and Regulations, Part 154, Special Hauling Permits, Subpart 145-2, Divisible Load Overweight Permits, Section 154-2.8 Safety – general (ALJ V).

## Complainant's Statement of the Case[4]

As an experienced truck driver, Mr. Wentworth was very familiar with the laws and regulations of the U.S. Department of Transportation ("DOT") and the New York Department of Transportation when he was hired by We Care on December 1, 2003. Soon after his arrival, Mr. Wentworth became aware that We Care was assigning him loads that were overweight and routes that were impossible to accomplish without violating the maximum hours of service established by DOT.

Eventually, in response to We Care's practices, Mr. Wentworth engaged in three activities protected in STAA. First, at a drivers' meeting on August 21, 2004, Mr. Wentworth voiced his concerns to the company general manager, Mr. Tagliente. Mr. Wentworth stated that the company drivers had to drive 73 miles per hour with trailers limited by permit to 55 miles per hour in order to accomplish their runs within the 11 hour DOT limit. He also complained about overweight trailer loads. Second, in meeting with Mr. Tagliente on August 23, 2004, Mr. Wentworth again expressed the same concerns. Third, on August 24, 2004, when confronted with trailers that exceeded 80,000 pounds and thus required Mr. Wentworth to have a permit which he did not possess, Mr. Wentworth informed the We Care dispatcher that he refused to transport any of the trailers.

In August 2004, Mr. Wentworth also suffered two principal adverse actions. First, on August 22, 2004, he was reassigned to a different route that would have paid between $368 and $1,900 less per month than his former route. Second, on August 26, 2004, We Care terminated Mr. Wentworth's employer as a company driver.

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[1]The following notations appear in this decision to identify exhibits: CX – Complainant exhibit (formerly marked, "plaintiff exhibit"); RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

[2]At the hearing (TR, pages 267 to 271), I reserved "CX 48" in the event a revised CD of the recorded conversations, consistent with my prior determinations needed to be submitted post-hearing. Subsequently, a revised CD was not submitted.

[3]At the close of the hearing, I left the record open for 30 days for the possible depositions of Mr. John Wallace and either the deposition of, or a statement from, an OSHA representative (TR, pages 374 to 380). To date, no additional post-hearing evidence has been submitted.

[4]Opening statement, TR, pages 11 to 13, and closing brief, dated July 8, 2005.

Both direct evidence and temporal proximity establish that Mr. Wentworth suffered these adverse actions due to his protected activities. After receiving Mr. Wentworth's complaints, Mr. Tagliente indicated to other individuals that he had become a problem and that his reassignment was due to the complaints he raised. The exceptional close timing between the protected activities and adverse actions also raises a retaliatory causation inference. The day after his initial complaint, Mr. Wentworth was reassigned and within five days he was terminated from employment.

Concerning We Care's stated reasons for the adverse actions, including an allegation of insubordination, the Respondent has presented inconsistent, incorrect, and non-credible evidence which significantly undermines the purported legitimate reasons for the reassignment and termination. Of particular note, the evidence demonstrates Mr. Wentworth's termination for alleged insubordination was a singularly unusual response by We Care for that type of offense.

As remedies, Mr. Wentworth seeks reinstatement, compensatory damages in the form of lost wages totaling over $15,000 and continuing each week at the rate of $341, an appropriate award for emotional distress which some courts have approved up to $100,000, and reasonable attorney fees upon petition.

## Respondent's Statement of the Case[5]

We Care drivers transported either pre-loaded or "live" loaded trailers of garbage from dump sites/stations to landfills. Mr. Wentworth was hired as one of those drivers in December 2003. At that time, Mr. Wentworth also owned and operated a garage, repairing cars. He used his We Care driver's pay to subsidize the personal business.

The participants at the August 21, 2004 drivers' meeting presented two different versions of Mr. Wentworth's statements. Some individuals recalled Mr. Wentworth complained about speeding and overweight trailers. However, other individuals, including Mr. Wentworth's managers and supervisors, believed Mr. Wentworth raised concerns about new rates schedules and the length of time his New York City route required for completion. This later interpretation is supported by the fact that Mr. Wentworth drove a sleeper tractor which permitted him to obtain the requisite rest to comply with the hours of service limitations. Additionally, his supervisor believed the complaints related to Mr. Wentworth's personal situation associated with his garage business. Consequently, due to the uncertainty concerning the nature of his statements, Mr. Wentworth has failed to demonstrate that he engaged in a protected activity at this meeting by advising management of specific safety issues.

The route reassignment shortly after the August 21, 2004 drivers' meeting was not punishment, retaliation, or an adverse personnel action. Instead, based on Mr. Wentworth's statements to Mr. Tagliente that he was not completing the New York City run in time to be home by noon, and at Mr. Wentworth's request, Mr. Dufore changed Mr. Wentworth's assignment to Agawam, Massachusetts. This route was shorter because it permitted Mr. Wentworth to pick up a pre-loaded trailer rather than having him wait for "live" loading. In the

[5]Opening statement, TR, pages 14-17, and closing brief, dated July 10, 2005.

August 23, 2004 meeting with Mr. Wentworth, Mr. Tagliente explained the route reassignment was not punishment.

Concerning the August 23, 2004 meeting with Mr. Tagliente, close scrutiny of their conversation and consideration of past inconsistent statements and actions by Mr. Wentworth demonstrate that he was not presenting any viable safety concerns to We Care management at that time. As a result, during this meeting, Mr. Wentworth did not engage in any protected activity.

On August 25, 2004, after informing the We Care dispatcher that no legal loads were available for him to haul, Mr. Wentworth was given two options. He could either drive to New York City to pick up a different trailer or he could return to the We Care facilities with another driver. Mr. Wentworth chose to ride back with another driver. Later, he changed his mind and without informing any We Care supervisor, Mr. Wentworth drove his tractor and empty trailer back to We Care, costing the company $600. Due to that decision, Mr. Tagliente fired Mr. Wentworth for insubordination because he didn't inform Mr. Tagliente about his change of mind and intention to drive back with an empty trailer.

Further, Mr. Wentworth's refusal to accept a load on August 25, 2005 did not constitute any protected activity. The permit issue related to state law and not any regulation, standard or order of the United States concerning commercial vehicle safety. Likewise, since he routinely drove overweight trucks, Mr. Wentworth's refusal to drive was not based on any concern for personal or public safety.

Mr. Wentworth has failed to demonstrate that he engaged in protected activities and that any such activities contributed to the personnel actions taken by We Care. Mr. Wentworth's route was changed to accommodate his personal business concerns. We Care terminated his employment due to insubordination. Consequently, We Care did not violate the employee protection provisions of STAA. To the extent a violation has been found, Mr. Wentworth's relief is limited by his failure to accurately establish the extent of his damages and mitigate those damages.

## ISSUE[6]

Whether Mr. Wentworth engaged in a STAA protected activity which caused We Care to change his route and terminate his employment.

[6]As subsequently discussed in detail, since this case was fully litigated on the merits, my attention is focused on whether the Complainant has meet his ultimate burden of proof by a preponderance of the evidence.

## SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

### Sworn Testimony

*Mr. William H. Bush, III*
(TR, pages 17 to 62)

[Complainant direct examination] Mr. Bush was a road truck driver for We Care from August 2003 to late spring 2005. In a December 2003 drivers' meeting, Mr. Wentworth noted that they were driving into DOT road checks and being ticketed for overweight trailers. Mr. Tagliente, the general manager, told the drivers not to worry about the tickets, the company attorney would pay for them. He also indicated that while one truck gets caught, ten trucks get by and that covers the costs of the tickets. The operations manager, Mr. Art Dufore, expressed a belief that some people in the company had been telling the DOT the company was running overloaded trucks. Mr. Dufore said if he found who had talked to DOT that person would be fired. Mr. Bush recalls Mr. Tagliente adding, "That's right. That's insubordination."

Mr. Bush was pretty well intimidated at this meeting. As a We Care driver, he hauled overweight loads and was ticketed. Due to wait times associated with the loading and dumping, he lied on his federal logbook because he would not have been able to complete the route as assigned. Rather than taking the required hours off, he would drive for as long as he could and then pull over and sleep. At that time, the requirement was eight hours, but he was only taking four hours to sleep. On some of the routes, he exceeded the maximum hours of service; on other trips, he exceeded the maximum driving hours. His wife, who was also a We Care driver, did the same thing. In April 2004, they stopped falsifying their logbooks after his wife fell asleep at the wheel and woke up just before she almost had a serious accident. They now take the required time off.

Mr. Bush's January 6, 2004 logbook was falsified (CX 39). His 15 minute entries for loading and unloading are false since both processes took a lot longer. He recorded 15 minutes to "save" his hours of service, so he only showed 10.74. The April 5, 2004 logbook for the same trip is accurate. It shows three and a half hours to unload in Waterloo, New York, two hours loading in Danbury, Connecticut, and 14 hours total. Although he signed a company statement indicating that he wouldn't violate any federal laws or regulations, Mr. Bush falsified his logs because he was "going with the flow of the company." Because it was pretty obvious the logs sheets were incorrect, he believed that if the company was really concerned about the accuracy of his logs, they would have told him he shouldn't do it.

After Mr. Bush and his wife starting accurately reporting their times in their logbooks and taking the required time off duty, he received an "unreliability" letter signed by Mr. Dufore indicating that a customer was experiencing production and staffing problems because Mr. Bush was arriving later and later. When Mr. Bush asked Mr. Dufore whether he wrote the letter, Mr. Dufore nodded no. Asked if Mr. Tagliente wrote it, Mr. Dufore nodded yes. Shortly thereafter, Mr. Bush was taken off that customer's route and placed on a "less paying run."

Mr. Bush believed speeding was an issue because some of the trailers had structural problems. He eventually confronted Mr. Dufore about his situation and concerns. He also indicated to Mr. Tom Jarrard,[7] the company's part-owner, that their routes were based on 75 miles an hour. Mr. Jarrard did not respond.

He was present at the August 21, 2004 We Care drivers' meeting. About 40 people attended the meeting, including Mr. Wentworth, Mr. Dufore, and Mr. Tagliente. At the meeting, Mr. Wentworth voiced several concerns about safety, including hauling permitted loads over 55 miles per hour. Mr. Wentworth questioned who would be responsible if someone hit his truck or someone was killed in an accident.

Mr. Wentworth was also concerned about an hours of service problem with the trips coming out of New York City. Due to sitting/waiting and driving time, drivers were having trouble running the loads legally under the hours of service. He noted that with a loaded, permitted trailer, he could only drive 55 miles per hour. Mr. Tagliente responded that on the Thruway 73 miles per hour was not a problem. When Mr. Wentworth noted that the trailer permit said 55 miles per hour, Mr. Bush recalls Mr. Tagliente saying, "What don't you understand? Seventy-three miles an hour, they don't even look at you."

Mr. Wentworth also indicated that he was uncomfortable pulling trailer loads for which he did not have a permit. Mr. Tagliente indicated that the company would pay for tickets issued for overweight loads.

Mr. Wentworth complained about logbook violations. He felt he was being encouraged to violate the hours of service and commit violations in his driving logbook.

Mr. Tagliente seemed to become angry as Mr. Wentworth presented his concerns. At one point, he told everyone to shut up because he was talking.

Mr. Dufore told Mr. Bush that Mr. Wentworth was terminated for bringing back an empty truck.

[Respondent cross examination] Mr. Bush falsified his January 2004 logbook in order to ensure that he would not go over the 70 hour limit for the week.

Mr. Bush acknowledged that as a licensed commercial truck driver he is required to understand the hours of service requirements and his signature in the logbook certifies its accuracy. Through April 5, 2004, Mr. Bush chose to perform his driving duties illegally.

When he first started driving for We Care, Mr. Bush tried to drive the runs legally but decided he couldn't do it legally if he was to meet the company's delivery criteria. He continued to work for We Care because the job "wasn't bad work." He believed Mr. Dufore would at least listen to his concerns. After Mr. Tagliente had a confrontation with Mr. Bush's wife, Mr. Bush stayed with We Care because he wasn't going to be run out. In regards to the altercation, Mrs.

[7]In the transcript, his last name is misspelled "Girard."

Bush has pending litigation against We Care. However, Mr. Bush denies he's attempting to punish Mr. Tagliente.

[Complainant re-direct examination] Mr. Bush also stayed with We Care because he needed the money. During the time he was falsifying his logbook, the company told him he was doing a good job.

[Respondent re-cross examination] After he stopped falsifying his logbook, Mr. Bush believes he was no longer considered to be a team player.

[Complainant re-direct examination] On one occasion, when turning in his falsified logbook, Mr. Bush pointed out his 15 minute entry to Mr. Dufore, who smiled.

*Mr. Jonathan E. Waldron*
(TR, pages 63 to 75)

[Complainant direct examination] Mr. Waldron was present at the August 21, 2004 drivers' meeting and heard Mr. Wentworth make complaints about safety concerning logbooks and overweight loads. He was concerned about the hours it took to do his run because it was pretty tight log-wise to do everything legally. Mr. Wentworth also noted that either the trucks didn't have permits or were run over their permits. Mr. Tagliente responded that the company was trying to get the truck permits.

Mr. Wentworth also voiced a concern about speeding. Mr. Tagliente didn't indicate that speeding was acceptable. He did ask whether Mr. Wentworth had ever been stopped doing 73 miles per hour. Mr. Tagliente also indicated the company attorneys would take care of the tickets. Mr. Tagliente became "kind of defensive." Mr. Tagliente came across as "either, you know, do it, or find employment somewhere else kind of deal."

After the meeting, he heard Mr. Dufore talking to another driver about drivers giving him problems, complaining about overweight and over hours. Mr. Tagliente joined the other two individuals and said, "We're going to have to do something about this situation." Based on what he heard, Mr. Waldron called Mr. Wentworth and told him to watch his back. He let Mr. Wentworth borrow his cassette tape recorder. The next day, Mr. Wentworth was placed on a different route and wasn't making as much money. Mr. Wentworth left the meeting "kind of upset because it really didn't go anywhere for him."

When he started driving for We Care, Mr. Waldron did not have the proper permit and he ran overweight loads. Mr. Dufore, Mr. Tagliente, and the company dispatcher, Mr. John Voss, knew about his situation. We Care indicated they were working on his permit. Eventually, he got the permit.

When asked whether he ever exceeded the speed limit, Mr. Waldron responded, "Everybody speeds." To meet the schedules, "sometimes that extra couple of miles per hour will help."

We Care did not encourage Mr. Waldron to violate the hours of service regulations. We Care did not encourage him to falsify logbooks.

[Respondent cross examination] Mr. Waldron believes at least one of the drivers referenced by Mr. Dufore at the end of the August 21, 2004 meeting is still driving for We Care.

Mr. Waldron remembers what Mr. Wentworth said at the meeting because Mr. Wentworth stood up when he made his comments.

*Mr. Arthur E. Dufore, Jr.*
(TR, pages 76 to125)

[Complainant direct examination] Since March 2004, Mr. Dufore has been the operations manager for We Care. Prior to that assignment, he was the company dispatcher. At that time, Mr. Tagliente was the general manager; he now is a yard and shop foreman.

On August 25, 2004, while driving back from a customer's location with Mr. Tagliente, Mr. Dufore heard Mr. Dave Salato[8] call Mr. Tagliente on a Nextel two-way cell phone. Mr. Salato indicated that Mr. Wentworth was at the Agawam yard and did not have a permit for the trailers. Mr. Salato asked Mr. Tagliente what he wanted Mr. Wentworth to do. Mr. Tagliente had two options: Mr. Wentworth could either ride back with another driver from Agawam or continue on to New York City. Later, Mr. Tagliente called Mr. Wentworth on the telephone. Mr. Tagliente told Mr. Wentworth he could clear his stuff out of the truck and ride back or go to New York City since he had a permit for the trailer he already had.

When Mr. Dufore and Mr. Tagliente returned to We Care at 5 in the afternoon, they saw Mr. Wentworth's tractor and trailer parked in the yard. The truck number belonged to Mr. Wentworth. They both asked why his truck was in the yard. Mr. Tagliente asked Mr. Wallace, the dispatcher, about the truck and trailer.

The next morning, Mr. Dufore heard screaming and hollering in the doorway. Mr. Wentworth said he had called DOT and Mr. Tagliente was going to lose his job. The exchange lasted three for four minutes.

Mr. Dufore does not know why Mr. Wentworth was terminated. He didn't ask Mr. Tagliente why he fired Mr. Wentworth. In his subsequent OSHA statement, CX 11, Mr. Dufore indicated why he believed Mr. Wentworth was fired.

Mr. Dufore also acknowledged his prior statement that normally a driver wouldn't get fired for running back empty. If a driver decided on his own to come back empty, Mr. Dufore believes the company's response would be a suspension and not a termination. However, "that was the general manager's call." The company has a stepped disciplinary policy, indicated in CX 20.

[8]Misspelled in the transcript as "Slato."

Mr. Dufore was present at the August 21, 2004 driver's meeting. At the meeting, Mr. Wentworth made a comment to Mr. Tagliente about pulling overweight loads out of New York City. Since Mr. Dufore was preparing other "stuff" for the rest of the evening, he didn't hear much else.

When Mr. Wentworth made his comments, Mr. Tagliente had been discussing the new rate sheet for New York City. Mr. Tagliente wanted the drivers to drive their permitted weights so the new rate provided for full pay only if they had their permitted loads. At the same time, the company did not want to penalize the drivers if the garbage was bulky, yet light. So if the trailer was full, the driver received full pay. The trucks sent to New York City were permitted for 32 tons. If a truck was not permitted for 32 tons, the driver would just load to the permitted weight and tell the dispatcher and there'd be no penalty. Mr. Dufore acknowledged the written policy does not describe these exceptions. Mr. Wentworth's permit, CX 5, allowed a maximum weight of 100,060 pounds or about 28 tons, rather than 32 tons. The load permits are assigned to each tractor-truck and trailer and a driver is then assigned to a specific tractor-truck.

After reviewing a prior statement, Mr. Dufore also recalled that Mr. Wentworth said that in order to complete the runs he would have to run over his hours. However, Mr. Dufore also noted that since the trucks have sleeper berths, if the driver runs out of hours, he can pull over and get 10 hours of rest.

Mr. Wentworth's route was changed the Monday after the drivers' meeting. Mr. Dufore made the change "[b]ecause Mr. Wentworth had mentioned that he needed to be back by noon every day so he get to his other business." Mr. Tagliente told Mr. Dufore about the request just after the drivers' meeting. Mr. Tagliente asked if there was anything else out there and Mr. Dufore indicated the Agawam run was available.

After Mr. Wentworth made the new run the first time, he asked Mr. Dufore why his route had been switched. Mr. Dufore indicated so that he could be back by noon for his other business. Mr. Wentworth did not ask to be switched back to the New York City route. The Agawam run pays about $143, the New York City trip is $232 to $260. If the load was less than 32 tons, it paid $202.50.

Mr. Dufore was not aware in August 2004 that drivers were pulling overweight trailers. At the same time, the company was receiving overweight tickets. The drivers had been instructed not to accept overweight loads. The company also has a policy in the handbook against their drivers speeding. Mr. Dufore would consider speeding to be insubordination. Mr. Dufore does not know whether We Care drivers falsify their driving logs. An operations assistant goes through the logs for errors. If the assistant found over-hours problems, she would tell Mr. Dufore. That occurred about once every three weeks. Either Mr. Tagliente or Mr. Dufore would then discuss the problem with the driver. Falsification would also be insubordination. Mr. Dufore is unaware of anyone being disciplined for carrying an overweight load, speeding or making false logbook entries. Mr. Tagliente handled discipline.

[Respondent cross examination] Runs are assigned based on company seniority. There is no penalty if a driver does not make it back and only gets four rather than five runs in a week. The only scheduling issue with Mr. Wentworth was his need to be back by noon. That concern was related to his personal business rather than hours of service.

Mr. Dufore made the determination to change his route. At present, there are only two New York City runs. So, in terms of seniority, Mr. Wentworth would not still be assigned to those routes. About the time they took Mr. Wentworth off that route in early 2004, other drivers also were removed.

In the Syracuse area, six or seven trucking companies are operating. As result, We Care faces a lot of competition for truck drivers.

[Complainant re-direct examination] After the August 21, 2004 safety meeting, Mr. Tagliente told Mr. Dufore about Mr. Wentworth's personal scheduling issue.

The company does not have any drivers who regularly only carry four loads a week.

*Mr. Kenneth J. Wentworth*
(TR, pages 127 to 199)

We Care hired Mr. Wentworth as an over-the-road truck driver on December 1, 2003. The first load he pulled was overweight. It was a pre-loaded sludge trailer. The pick-up didn't have a scale so he did not discover the problem until he dumped the load. Since he did not have a permit, the weight limit was 80,000 pounds. His trailer was definitely over that limit. Within two weeks, he was also pulled over and ticketed for an over-weight load.

Mr. Wentworth did not receive a permit until June 2004. At that time, he was permitted for one trailer, number 167, CX 5 & CX 6. During the course of his employment with We Care, Mr. Wentworth received four or five overweight citations. Mr. Wentworth turned in the tickets and We Care paid them. He was never disciplined for the overweight tickets.

In early 2004, on the New York City route, Mr. Wentworth came to the conclusion that he had to speed to complete route. He had to speed to get the run done within 11 hours. If he didn't speed, Mr. Wentworth would have been out of hours before he reached the landfill. He believes We Care encourages speeding because the object of the route is "get down, get loaded, and come back and dump" within the 11 hour duty limit set by DOT. You could not exceed the 11 hour limit if you wanted to run five loads a week. The We Care drivers do five runs a week. "You're down and back, down and back. No sleeping in the truck. It's down and back. You've got to do it in 11 hours. So, to do it in 11 hours, I explained to them, I've got to run 73 miles an hour to get back and have that run done and it was actually 10 and 3/4 hours." Due to this arrangement, Mr. Wentworth was unable to drive the 55 miles per hours stated by the permit.

Mr. Wentworth never received any speeding tickets. Every time he ran the New York route, Mr. Wentworth had to speed. While he was initially worried about speeding, he came to learn that it only becomes an issue if someone dies as a result of the truck's operation. So, if the

driver is speeding, pulling an overweight load, or is out of hours, he can be expected to be charged with many offenses if an accident happens, including perhaps a felony.

CX 10 appears to be a very close reflection of his runs for We Care. Since his tractor-truck didn't have a permit, any load listed with a gross weight over 80,000 would be illegal. 80,000 pounds was standard with no permit. Subtracting the weight of 36,000 pounds for truck number 58 from 80,000 gross weight shows a net weight of about 43,840 pounds he could carry. Any load over that amount would violate the overweight law. Truck number 2990 was even heavier at about 38,500 pounds. Essentially, about 22 tons was his legal load limit; so most of the loads for January 2004 exceeded that limit. When Mr. Wentworth received his permit, his allowable gross weight increased to 100,060 pounds.

The permit and load limit system is established to ensure that the axle distribution on a truck gives it a safe stopping distance and sufficient stability. In other words, the state would determine a safe load for a truck based on the number of axles and the distance between them. For greater loads, a truck needs "more axles underneath it" and extra braking since the extra weight gives a truck a longer stopping distance. When Mr. Wentworth refers to an overweight load, he means the load exceeded either the truck's capacity or the amount allowed by the permit.

In May or June of 2004, Mr. Wentworth became aware of a We Care policy to have drivers who return early to the yard, "grab a loaded trailer off the pad and take that onto the hill and dump it, so that they could get another empty off that night." The "hill" is the Seneca Meadows dump. The loaded trailers were on the pad because some drivers did night runs and returned when the landfill wasn't open; so, they would drop their loaded trailers on the pad. Almost every day, if you returned early and the landfill was open, they would tell the driver to make a run to the dump. Mr. Wentworth didn't like being assigned the extra run when he got back; he was usually tired and just wanted to go home. So, he made a deal with Mr. John Wallace, the dispatcher, that instead of doing the extra runs when he returned, Mr. Wentworth would work on Saturdays. The company required drivers to work every third Saturday. Mr. Wentworth agreed to work every Saturday instead of "running to the hill that extra load." Mr. Wallace indicated that it was okay with him but he needed to check with Mr. Tagliente. Mr. Wentworth's logbook, CX 42, show that he started working every Saturday. He believes he started working every Saturday the later part of May or early June 2004.

When Mr. Wentworth received the new rate structure set out in CX 1 (Mr. Wentworth had never seen CX 2 with the change to 31 tons) in the mail, he went to Mr. Dufore and told him that he couldn't run 32 tons legally. Mr. Dufore said not to worry because the part-owner couldn't do that. Mr. Dufore told Mr. Wentworth to run up to his permit and he wouldn't be penalized. However, on his next pay check, when he wasn't pulling 32 tons, Mr. Wentworth received "a lot less pay because of it." Before the change, he made about $232; after the change, his pay "would go as low as $160." The new rate schedule had an attached memorandum, CX 3. Due to the rate change and memo, Mr. Wentworth believed that he was being penalized for running legally. He believed the company was trying to get its drivers to pull more weight.

At a drivers' meeting on August 21, 2004, Mr. Wentworth "voiced a concern I had, one about running too fast with the permitted trailers and overweight." One driver asked about the rate change and Mr. Tagliente responded. At that point, Mr. Wentworth told Mr. Tagliente, "we've got to run 73 miles an hour on a 55 mile an hour permit to get this run done in 11 hours." In reply, Mr. Tagliente asked whether he had ever been stopped doing 73 miles an hour. According to Mr. Tagliente, the drivers would only be bothered if they were doing 74. Mr. Wentworth again noted that they were still going 18 miles an hour over the limit and they were running overweight. Mr. Tagliente responded that the company lawyer would pay the tickets. Mr. Tagliente started to get "a little hot." He yelled at Mr. Wentworth, asking him if he had the rate schedule and memo. When he showed it to Mr. Tagliente, he again explained the contents to Mr. Wentworth. Mr. Wentworth left at the end of the meeting.

The next day, Mr. Wentworth's route was changed. The night dispatcher, Mr. Dave Salato, told Mr. Wentworth that instead of going on the New York City run, he was going to Agawam. When he returned the next day, Mr. Wentworth tried to talk to the day dispatcher, Mr. Wallace, about the change. Mr. Wallace didn't know why his assignment was changed. Mr. Wentworth then asked Mr. Dufore. Mr. Dufore indicated that Mr. Salato wanted drivers at another location to go instead. Since Mr. Dufore's explanation didn't make any sense, he then went to talk to Mr. Tagliente on August 23, 2004.

Mr. Wentworth decided to tape record everything after Mr. Waldron told him that after the August 21, 2004 drivers' meeting that he heard Mr. Tagliente and Mr. Dufore say they were going to do something about him. So, when his route changed the next day, Mr. Wentworth concluded that he had become a problem for We Care and he wanted to get on tape the reason why he was taken off the New York City route.

After returning from his route on August 23, 2004, between 11:00 a.m. and 1:00 p.m., Mr. Wentworth went to Mr. Tagliente's office to discuss the change. Briefly, Mr. Wentworth told Mr. Tagliente that he couldn't run the 32 tons set out in the new rate schedule. Mr. Tagliente indicated that made a big difference. Mr. Wentworth understood he would make less under the new rates. Then, Mr. Wentworth asked why he was switched off the New York City run. He also explained that he didn't mean to get anyone upset with him. Instead, he just wanted to know at the meeting what would happen and who would be responsible if someone dies while they're speeding or running overweight. Mr. Tagliente responded that maybe Mr. Wentworth was in the wrong business. Mr. Tagliente noted that the police don't bother truckers doing 73 miles an hour and everybody cheats. Mr. Wentworth also noted based on the times another driver was running the New York City route he had to be lying on his logs. Mr. Wentworth wanted Mr. Tagliente to be aware of that practice. Mr. Tagliente acknowledged Mr. Wentworth's statement and indicated that the company was trying to get more trucks. Concerning the route reassignment, Mr. Tagliente stated he didn't know why Mr. Wentworth had been taken off that route. Mr. Wentworth then asked Mr. Tagliente to find out why there was a change and see if Mr. Wentworth could get back on the route. Mr. Tagliente indicate he would let Mr. Wentworth know.

Later that day, while Mr. Wentworth was eating lunch with his son, Mr. Tagliente, who called himself, "Coach Pete," called him on the Nextel two-way cell phone and said the reason

he was taken off the New York City route was because he was complaining at the Saturday meeting. Mr. Tagliente stated that if Mr. Wentworth wanted back on the route, he had to see Mr. Dufore. Again, Mr. Dufore had told Mr. Wentworth his route was changed because they assigned drivers from another location to that route.

After his route reassignment, probably on August 24, 2004, Mr. Wentworth contacted the Federal Motor Carrier Safety Administration and OSHA because he believed he was being treated unfairly.

Concerning the scheduling of his run, Mr. Wentworth's route for Monday was already on the company board on the Friday before. Prior to the Saturday driver's meeting, the scheduled route for the following Monday was New York City. However, Sunday, at noon, Mr. Salato informed him that the route was changed.

On his reassigned route to Agawam, Mr. Wentworth made $100 less.

On August 25, 2004, as he was headed to Agawam, Mr. Wentworth had some problems with the truck's marker lights. So he pulled over and didn't resume driving till daylight. He reached Agawam around 8:00 to 8:30 a.m. and discovered all the trailers were overweight for the permit he was carrying. Consequently, he called Mr. Salato and told him "there wasn't anything there I could pull legally." Mr. Salato replied that Mr. Wentworth had never complained before and wondered why he was complaining at that time. Mr. Wentworth responded that he had complained at the meeting and "got whacked" and he wasn't going to run illegal. After a pause, Mr. Salato indicated there was nothing legal there for him. When Mr. Wentworth called again to ask what he should do, Mr. Salato said he was still waiting to hear from Mr. Tagliente. The next phone call came from Mr. Tagliente who gave Mr. Wentworth two options. Mr. Wentworth could either go down to New York City to live load and take ten hours off down there. Or, Mr. Wentworth could get laid off until the company got new permits at the end of the week, so they would both be protected. In thinking about his two options, Mr. Wentworth was not prepared to spend time in New York City; he didn't have money to spend. So, he told Mr. Tagliente that if the permits were coming in at the end of the week, he'd just take a lay off till then. Mr. Tagliente said "fine," and told Mr. Wentworth to take his personal belongings out of the truck and ride back with another driver.

Mr. Wentworth then called the head of the Federal Motor Carrier Safety Association and told her that he had just been laid off for refusing a load and Mr. Tagliente wanted him to ride back in one of the overloaded trucks. She advised that was not a good idea. Mr. Wentworth agreed. If he didn't want to drive an overloaded truck, then he also didn't want to ride in one.

Mr. Salato then called him and asked what he was going to do. Mr. Wentworth replied that he was going to come back empty because he did not want to ride in an overloaded truck. Mr. Salato had no response. Mr. Wentworth then drove the truck back to We Care, cleaned out his personal belongings, and went home.

At that point, Mr. Wentworth wasn't sure whether Mr. Tagliente was getting rid of him or was actually waiting for the permits to come in. However, the next morning, August 26, 2004,

Mr. Wallace called and said Mr. Tagliente wanted to see him. When Mr. Wentworth arrived at the office, Mr. Tagliente handed him a termination letter, CX 4. Mr. Wentworth read the letter, left Mr. Tagliente's office, turned in his company cell phone at the dispatcher's office downstairs and walked out. After he got into his car and started to drive away, Mr. Wentworth turned around because he had something to say. When he went back in, he saw Mr. Tagliente and became "a little heated." The first thing yelled was, "Didn't your stupid bastard night dispatcher tell you I was coming back?" Mr. Tagliente said, "Yeah." So, Mr. Wentworth "blew up" and asked why he was fired. However, he didn't let Mr. Tagliente talked; instead, he told him that DOT was coming down due to his contacts. Mr. Wentworth charged they were running drivers illegally and someone was going to die. Very emotional, he stated that Mr. Tagliente was not going to last very long and said his job was gone. Then, Mr. Wentworth left and went to his car. Mr. Tagliente followed him and said that he was just going to lay him off to protect him. However, Mr. Wentworth asked who was protecting the other two drivers who pulled the heavy loads. Mr. Tagliente indicated the company didn't tell them to take those loads, they did that all by themselves. Mr. Wentworth made an obscene hand gesture and drove off. Though he was upset, Mr. Wentworth did not make any "physical threats." At the most, he waived his finger at Mr. Tagliente.

On one prior occasion, Mr. Wentworth returned to We Care empty. In December 2003 due to a snow storm, he called Mr. Tagliente about the blizzard who said, "We always go." Mr. Wentworth drove a little further then decided the weather was too bad for him. So, he returned empty. When he explained why he returned, not a word was said to him; no other action was taken by the company. CX 43 is a log of that trip. Mr. Wentworth is aware of a few incidents when for various reasons drivers came back empty.

In a December 2003 drivers safety meeting to discuss new log books, Mr. Wentworth mentioned that he was running into DOT and had already received a ticket. He was informed that We Care pays for overweight tickets. Mr. Dufore indicated they were a "couple of rats" in the company who had gone to DOT claiming the company was running overloaded. If he found out who they were, Mr. Dufore threatened to fire them. Mr. Tagliente added, "that's right, that's insubordination." So, from that point on, Mr. Wentworth felt that's what he had to do.

Over the year he was at We Care, Mr. Wentworth made $28,000. He agrees that CX 32 shows what he was making. CX 16 concerns his health insurance.

After he was terminated, although he made a couple of inquiries at a towing company and his prior employer, Mr. Wentworth couldn't find any work until he went down to Florida to pick up debris from a hurricane at the end of September. CX 45 shows the pay he earned during the clean up of about $1,200 a week. The job lasted until Thanksgiving.

In December 2004, Mr. Wentworth started his present job, driving a tow truck. CX 46 shows his biweekly pay at the towing company. He's up to $10 an hour, plus a 25% commission on what the tow truck produces. CX 46 reflects his average biweekly pay check.

The stress associated with his termination has been "unbelievable." He lost "a lot of sleep." He still had a garage business back then and getting fired by We Care really hurt his

ability to get that business going. In terms of physical symptoms, Mr. Wentworth has "nerves." He "can feel my heart pumping." And, sometimes, when he thinks about the termination, "it's taken so long to get to sleep." Since he doesn't have health insurance, he hasn't seen a doctor.

[Respondent cross examination] We Care wanted their drivers to make five load a week. Mr. Wentworth doesn't believe there was ever a time when he did not make five runs in a week. In order to complete those runs he would speed if he "needed to." Mr. Tagliente, Mr. Dufore, and Mr. Wallace told him to speed. Mr. Wentworth drove at night because he liked it. There was "less traffic, less police, less everything."

Mr. Wentworth contacted OSHA by phone. They took down his complaint and indicated that he would be contacted by an investigator. He believes he was called by someone from OSHA about August 24th. He has never seen RX 1.

[Complainant re-direct examination] Mr. Wentworth contacted OSHA twice. He called after he was taken off the New York City run and he called again after he was fired. RX 1 references the second complaint. Later, an OSHA investigator met with him and took down a statement.

*Mr. Joseph M. Cummins*
(TR, pages 193 to 199)

[Complainant direct examination] Mr. Cummins started driving for We Care in March 2004. On one occasion, a dispatcher named Art threatened him. A letter had been turned into DOT and Art accused him of doing it. Mr. Cummins believed his job was being threatened if he was the one who sent in the letter. Art was upset that the rate schedule and memo had been sent to DOT, CX 1 and CX 3. A few days later, Art learned Mr. Cummins had nothing to do with the letter.

Mr. Cummins never complained about having to speed. "It was just more or less assumed that they knew that." Although the company representatives told them not to speed, "they know you can't do 55 and make it anywhere you're going in a day."

Mr. Cummins was at the August 21, 2004 drivers' meeting. He remembers an argument between Mr. Wentworth and Mr. Tagliente. The only specific thing he remembers about their exchange was Mr. Wentworth mentioning criminally negligent homicide. Mr. Tagliente "lost his temper with it."

*Mr. Kenneth J. Wentworth, Jr.*
(TR, pages 199 to 202)

[Complainant direct examination] Mr. Wentworth, Jr., is Mr. Wentworth's son. During lunch in August 2004, he overhead a conversation between his father and Mr. Tagliente over the Nextel speaker phone. Mr. Tagliente referred to himself as "Coach Pete." Mr. Tagliente said, "the reason we took you off of New York and put you on Agawam is because of the complaining

you were doing at the drivers' meeting." Mr. Tagliente told his father that if he wanted to get back on the New York route, he had to talk to Art.

*Mr. Sherman W. Barker*
(TR, pages 202 to 205)

[Complainant direct examination] Mr. Barker works on cars with Mr. Wentworth. In August 2004, during lunch, he overhead a conversation between Mr. Wentworth and a gentlemen who referred to himself as "Coach Pete" on a Nextel walkie-talkie. Coach Pete told Mr. Wentworth that he had been taken off the New York run and put on the Agawam run because of some of the complaining he did at a meeting; if he wanted back on the New York run, he had to talk to Art.

*Mr. John Cramer*
(TR, pages 205 and 206)

[Complainant direct examination] Mr. Cramer overheard a conversation between Mr. Tagliente and Mr. Wentworth at lunch in August 2004. "Coach Pete" told Mr. Wentworth that he was taken off the New York run because of the complaining he did at a meeting. If he wanted back on the New York run, he had to talk to Art.

*Mr. Peter Tagliente*
(TR, pages 207 to 353)

[Complainant direct examination] About two and a half months ago, Mr. Tagliente became the terminal manager for We Care. Prior to then, he was the general manager. He believes the switch was made because the company had grown and they needed more help. He didn't lose any status or pay. As the terminal manager, he's in charge of the terminal operations. In that position, he no longer deals with dispatchers or drivers. Now, the drivers report to Mr. Dufore who is the operations manager. The new general manager is Mr. Brian Roberts. When the switch was made, the company owners stated they were realigning jobs and bringing in more help due to the company's growth.

As general manager, Mr. Tagliente was responsible for safety compliance. Mr. Dufore and everyone else were also responsible. When We Care drivers are given their orientation, they're told "to follow the law as professional drivers." While We Care would be concerned about speeding, Mr. Tagliente thinks it is "more of a personal issue." If he had learned a driver was speeding, Mr. Tagliente would "of course" be concerned. When asked if driving overweight was a safety issue, Mr. Tagliente declared, "We do not drive overweight." As a result, driving overweight is not a safety issue for We Care. He is aware that driving overweight is a violation of the law. A driver is entitled to refuse to speed and to carry an overweight load.

Mr. Tagliente does not believe driving an overweight truck is unsafe because the We Care trucks and trailers "are made specifically to haul overweight. . . they are registered to be to pull overweights in New York state and Massachusetts." As a result, though it may exceed the legal limit, driver operating a vehicle that exceeds 80,000, without a permit, is not a safety issue.

In other words, driving more weight than permitted is probably a legal safety issue, but not a mechanical safety concern.

At the August 23, 2004 meeting in his office (which Mr. Tagliente has since discovered had been taped), Mr. Wentworth expressed a concern about what would happen if someone was killed. Mr. Tagliente doesn't recall his specific reply but he probably told Mr. Wentworth to be a professional driver and run legally. He advised him to abide by the speed limit. He also made generalized statements that everyone cheats and that DOT representatives have admitted trucks going 73 miles an hour would not draw a state trooper's attention. Mr. Tagliente believes it is unsafe to operate a truck at 73 miles an hour. Whether a driver speeds is an individual choice.

Sometime in early 2004, a DOT representative didn't deny when asked by drivers if DOT permits the weight limits to go over by 2%.

The part-owner Mr. Jarrard, issued the rate change in CX 1 and CX 3. Prior to the change, the drivers received a flat rate. Mr. Tagliente believes the new rates encourage drivers to pull their legal weight so they'd make the most money. If a driver were permitted for less than 32 tons, he'd receive less money. With the new rates, the drivers would be paid for what they carried. The change to 31 tons, set out in CX 2, was made August 1, 2004.

We Care did not encourage its drivers to haul loads overweight. However, if they were overweight, the company would give part of the money it received for the extra weight to the driver.

In his OSHA statement, CX 14, Mr. Tagliente indicated his belief that Mr. Wentworth's complaints were related to his getting back to the We Care yard in time for him to work in his shop.

Mr. Wentworth was switched to the Agawam run due to his stated concern to Mr. Tagliente about getting home on time. Mr. Wentworth had raised that concern at the meeting. He discussed that situation with Mr. Wentworth after the meeting. He believes Mr. Dufore was standing near-by. Mr. Tagliente didn't make the change, Mr. Dufore did it. Mr. Tagliente doesn't even know if he told Mr. Dufore about Mr. Wentworth's concern. He believes Mr. Wentworth brought up the same problem with Mr. Dufore at the meeting because Mr. Wentworth's main concern was being home on time so he could get to his other business.

When Mr. Wentworth asked him about the change, Mr. Tagliente told him because "that's what he wanted, to be home on time." He liked to run at night and wanted to be home before noon. Mr. Wentworth told Mr. Tagliente he disagreed with Mr. Tagliente's belief about what he wanted. While Mr. Tagliente can't remember whether Mr. Wentworth asked to be put back on the New York run, he "was not happy on New York City, because it interfered with his personal business and being home when he needed to be home." Also, about that time, the New York City customer was "cutting us down."

In the morning of August 25, 2004, Mr. Tagliente was driving with Mr. Dufore in Massachusetts when Mr. Salato called about Mr. Wentworth. They were told Mr. Wentworth

was in Agawam and there was no legal trailer for him to pull. Eventually, Mr. Tagliente gave Mr. Wentworth two options. First, Mr. Wentworth could remove his personal belongings, leave his truck there, and ride back with another driver. Second, since he had plenty of drive time, he could go to New York City, "load legal," start his return back and stop to take his break when necessary. Mr. Wentworth chose to ride back with another driver. Mr. Tagliente called Mr. Salato and let him know that Mr. Wentworth was riding back.

Mr. Tagliente and Mr. Dufore returned late that afternoon. He doesn't recall whether he saw Mr. Wentworth's truck, but eventually the dispatcher, Mr. Wallace, called him and told him that Mr. Wentworth had driven his truck back empty. Mr. Tagliente told Mr. Wallace not to schedule Mr. Wentworth and to let Mr. Wentworth know he had to see Mr. Tagliente the next morning.

Either that evening or the next morning, Mr. Tagliente decided to terminate Mr. Wentworth's employment. He wrote the insubordination letter at work that morning. When Mr. Wentworth arrived, Mr. Tagliente told him that he was "disappointed in what he did." Mr. Wentworth read the letter and Mr. Tagliente terminated his employment. At that point, Mr. Wentworth left and went outside. Mr. Tagliente then went down to the dispatcher office and Mr. Wentworth came back in very boisterous, putting his finger in Mr. Tagliente's face, "in a threatening manner." He said he had recorded Mr. Tagliente and Mr. Tagliente was going to lose his job. The next day, Mr. Tagliente called the sheriff's department about the exchange. They recorded it in their log.

According to Mr. Tagliente:

> Mr. Wentworth was terminated for insubordination because he told me he was going to do something, then took it upon himself to do something else. He drove back empty, which no driver has ever driven back empty. And, he had another option to get a load. And, fourth thing is he cost the company money.

Mr. Tagliente did not recall Mr. Wentworth returning empty in December 2003 due to a snow storm.

Mr. Wentworth had been a "good, dedicated driver who really enjoyed his work." Mr. Tagliente never heard from him other than a greeting. However, over the few days before his termination, Mr. Wentworth "was always there and I didn't know what was wrong."

Mr. Tagliente did not have an agreement with Mr. Wentworth about working Saturdays. A rotation of three teams of drivers was set up and the teams were scheduled for Saturday work as long as their hours permitted. We Care accepted volunteers for the Saturday work since many drivers had other functions over the weekends.

Periodically, at the end of the day, when a driver returned from his regular run, there might be an extra load that needed to be driven if they still had hours of service remaining. Mr. Tagliente does not recall Mr. Wentworth indicating he did not want to take those extra loads. He

did not have any arrangement with Mr. Wentworth about not taking extra loads in exchange for working extra Saturdays. It's possible such an arrangement existed at the dispatcher's level.

During his August 23, 2004 conversation with Mr. Wentworth, Mr. Tagliente told him he was tired of dealing with cops and accidents. He believes there were so many accidents because the drivers were "not cautious enough." Mr. Tagliente did not attribute it to overweight loads or brake issues.

The company's conditions of employment, CX 20, requires the driver to comply with all safety rules and to observe safe work practices and procedures at all times. The safety rules include federal and state regulations.

We Care has a progressive disciplinary policy, when applicable. One of the prohibited acts is gross insubordination. This act warrants immediate departure from the company.

Mr. Tagliente called Mr. Jarrard and left a message about his decision to terminate Mr. Wentworth's employment. Mr. Jarrard did not return the call.

Mr. Tagliente had discussed Mr. Wentworth's concerns with Mr. Jarrard sometime after the Saturday safety meeting, probably the following Monday. He and Mr. Dufore discussed the meeting with Mr. Jarrard.

In deciding whether an act of insubordination warrants termination rather than demotion, Mr. Tagliente takes "everything into account." Mr. Wentworth was terminated because they agreed about what was going to happen and then "he took it upon himself to change that" and never called Mr. Tagliente. Prior to that incident, Mr. Wentworth had never been insubordinate.

Mr. Tagliente can't recall any other incidents in which a driver took it upon himself to disobey an agreement and was not terminated. Mr. Wentworth's decision to drive the truck and trailer empty was "gross insubordination to me, disrespect to me. He's got a phone. He could have called me."

As part of the OSHA investigation, Mr. Tagliente put together a list of other terminations, CX 34.

Between August 2003 and August 2004, Mr. Tagliente terminated several drivers, mostly for accidents. One was separated due to a positive drug test. Mr. Tagliente can't recall another driver being terminated for the first act of insubordination. One probationary driver who didn't follow directions on how to get somewhere received a disciplinary notice rather than termination. In the disciplinary letter, Mr. Tagliente characterized the driver's failure to follow the dispatcher's directions as gross disrespect and insubordination. Another driver who did not follow directions was also given a disciplinary letter and was not terminated. A third driver who failed to follow instructions was not terminated. One probationary driver refused a Saturday assignment and was terminated. Another driver who didn't comply with a dispatcher's instructions to pick up a second load, causing the company to fail to meet a scheduled commitment and to send another truck, received a disciplinary letter and was not terminated. His

offense was described as gross disrespect and insubordination. Another driver who arrived late without calling the dispatcher and lied was not terminated at the time but given another chance. In another disciplinary letter to a driver who didn't follow a dispatcher's order, Mr. Tagliente indicated the company could not tolerate employees who did what they felt like doing rather than doing what they had been told to do. That driver lost a part of his bonus but was not terminated. When another driver lied about a family commitment to refuse a dispatch, he was not terminated. Mr. Tagliente acknowledged that sometimes when drivers have accidents that are their fault and the accident costs the company money, they are not always terminated. Instead, their safety bonuses may be reduced. The disciplinary and safety bonus letters are contained in CX 51 and CX 53.

CX 55 shows that between January 1, and August 3, 2004, We Care paid over $60,000 in overweight fines. Mr. Tagliente doesn't believe any of the drivers were disciplined for receiving an overweight ticket because other than the live loads in New York City, most of the drivers do not load the trailers. "They're drop and hooks. They have no control over when the trailer is being loaded." At the same time, when the drivers pick up the trailers, they are aware of how much the load weighs and they decide whether to haul. Mr. Tagliente acknowledged that We Care does not discipline its drivers for accepting overweight loads. Mr. Tagliente was never given any direction by the company to discipline drivers for overweigh loads. We Care was paid either by a drop rate or tonnage. Mr. Tagliente confirmed that the company was getting more money for trailers that were a little overweight and the company shared that excess money with the drives who hauled the IESI (New York City) runs.

Although he thinks Mr. Wentworth's complaints were valid, Mr. Tagliente does not agree that the company was driving unsafely. He noted that concerning Mr. Wentworth's complaints about speeding and overweight driving, Mr. Wentworth did not have to do either. Concerning the New York City route, Mr. Wentworth was not required to speed because his truck had a sleeper berth. We Care did not tell him that he had to make five runs a week. "He was not forced to make it home every day. He forced himself to be home every day." Mr. Wentworth's normal dispatch was five runs a week. During the winter, many drivers don't make five runs a week. At other times of the year, Mr. Tagliente wasn't sure if other drivers made less than five runs a week.

[Respondent cross examination] Mr. Dave Salato is no longer employed by We Care. RX 2 is the safety bonus system established by the company CEO, Mr. West Gregory.

Mr. Tagliente fired Mr. Wentworth because he was given options, told Mr. Tagliente what he was going to do and then he didn't do it. "He blatantly did something on his own, did not tell anybody until he got back to work." When he made the decision to fire Mr. Wentworth, Mr. Tagliente was not thinking about what happened at the August 21, 2004 drivers' meeting.

[Administration law judge examination] At the August 21, 2004 meeting, Mr. Wentworth raised some questions about his speeding. He asked what would happen if he killed someone. Mr. Tagliente told Mr. Wentworth that he didn't know what would happen. Mr. Tagliente was not angry. If other people thought he was, they were mistaken.

The route change the following Monday was done at Mr. Wentworth's request. Mr. Wentworth asked him to change the route. Mr. Wentworth indicated "that he needed to be home earlier. We suggested something different, and he agreed, and he knew at that time it was a lower rate." That conversation occurred after the Saturday drivers' meeting.

Mr. Tagliente didn't give Mr. Wentworth a second chance "[b]ecause he didn't get back to communicate to me what he decided to do." At the same time, nothing else precluded Mr. Tagliente from giving Mr. Wentworth a second chance.

*Ms. Colleen Seeley*
(TR, pages 354 to 370)

(Respondent direct examination) Ms. Seeley is the office manager/controller for We Care. Her duties include accounting, booking, data entry and operations entry. She is also involved in the process associated with DOT audits.

RX 3 is a notice of a DOT audit for November. When the auditor arrived he told Ms. Seeley it was an random audit. RX 4 is the audit results.

The change in CX 2 to 31 tons occurred a few days after the new rate system was put in place on August 1. The company noted that using 32 tons, the drivers were not making as much as the regular road pay they had previously received. So, they lowered the requirement to 31 tons.

[Complainant cross examination] Ms. Seeley has never seen Part C of the DOT audit results. During the audit, DOT made some recommendations to Ms. Seeley on how she could improve the company's paperwork. For example, some information about prior employers of the drivers might be obtained from the internet. DOT also expressed concern about some hours of service issues. In response to the audit, We Care improved what they already had in place. They paid closer attention to anything that may have looked odd in the drivers' logs. They also started doing a better job tracking past employers.

**Documentary Evidence**

*IESI Rate Structure*
(CX 1 to CX 3)

On July 26, 2004, Mr. Tom Jarrard issued a new rate structure of loads picked up at three IESI transfer stations. Under the new rate system, drivers would receive 24% of the load receipt based on $33.75 per ton (about $259) as long as the load was 32 tons or over. The drivers would also receive an $8 per ton incentive for any tons over 32. If the trailer was carrying less than 32 tons, the driver's share dropped to 20% (about $202). Under this system, Mr. Jarrard emphasized that it was critical that both drivers and tractors had overweight permits. He stated, "If trucks do not have overweight permit, they cannot be sent on these accounts." Later, the threshold ton figure was crossed through and a new amount of "31" tons was added.

*Termination Letter*
(CX 4)

In a letter to Mr. Wentworth, dated August 26, 2004, Mr. Tagliente terminated his employment for insubordination. He was directed to turn in his phone, charger and uniforms. As an explanation, Mr. Tagliente noted that on August 25, 2004, Mr. Wentworth had called the dispatcher to inform him that he could not pull any of the trailers at Agawam because he wasn't permitted for them. Later, Mr. Tagliente told Mr. Wentworth he could either drive his trailer to pick up a live load (at IESI) or remove his personal belongings from the truck and drive back with another driver. Mr. Tagliente continued:

> You agreed that it would be safer for yourself as well as the company to hitch a ride back with one of the other drivers. You did not do this. You took it upon yourself to drive the tractor and trailer all the way back to the yard empty, after you agreed with me that you would not. Dispatch knew you were leaving the tractor and trailer there and was making arrangements to get the equipment the next day.

Mr. Tagliente stated Mr. Wentworth's actions cost 160 gallons of fuel, about $302, tolls amounting to $64, and $280 in maintenance overweight. He added, "Not to mention total disrespect to me for what we talk about and what you agreed to do."

*Load Permit*
(CX 5 and CX 6)

On June 16, 2004, the state of New York issued a load permit for tractor #2990 and trailer #7242 for a maximum gross weight of 100,060 pounds. The permit authorized the operation of this vehicle combination at the maximum operating speed of 55 miles per hour. The permit became null and void if the vehicle combination was operated "in violation of any posted weight restriction."

*Letters to Investigator*
(CX 8 and CX 52)

In a September 23, 2004 letter, addressing Section 11 (c) (1 and 2), Mr. Tagliente responded to an investigator. Mr. Tagliente indicated that Mr. Wentworth was not fired for filing a complaint on August 21, 2004. According to Mr. Tagliente, he didn't receive notice of the complaint until September 21, 2004. Instead, Mr. Wentworth was fired because on August 25, 2004 Mr. Wentworth, "after our conversation and agreement of what he was supposed to do, took upon himself to do what he wanted to do."

In another September 23, 2004 letter concerning Section 31105 (STAA), Mr. Tagliente also denied that Mr. Wentworth was discharged, disciplined or discriminated against for making a complaint on August 21, 2004. According to Mr. Tagliente, "I did not know anything about his complaint until the morning of September 21st when I received my mail." The reasons for his termination were set out in the August 26, 2004 termination letter. Concerning the

overweight issue, Mr. Tagliente indicated that Mr. Wentworth was permitted to haul up to 100,000 pounds. Mr. Wentworth's concerns at the safety meeting were about the rate structure for the New York City runs and the increased time due traffic and getting loaded to the permitted weight. The loads went from a flat rate to a per ton rate.

Mr. Wentworth was worried about the "legal drive time and the actual time getting back to the yard." Mr. Tagliente explained:

> When Ken was hired he wanted to run at night and be done before 10 to 11 am in order to be at his personal business all afternoon. We try to accommodate all of our drivers to try to keep them satisfied with doing their job. When a few of the trips started to take longer and the extra time cut into personal business time, Ken brought this concern to me. After the safety meeting on the 21st of August, Ken and I talked about doing another run as to get him home quicker. Granted, he knew it would not pay as much but Ken seemed to more concerned with the time as opposed to the pay . . . Together, we agreed a different run might help to accommodate his daily schedule. On Monday August 23d, after his run from Agawam to the landfill and back to the yard, Ken came up to my office. He asked me why he was put on this particular run. I explained to him it was what we all thought he wanted. This would ensure him that there would be no over hours of driving, we gave him one of the night runs that he wanted which also ensured him to be able to get to his personal job at noon when he wanted to be there.

Mr. Tagliente also denied that We Care gave the New York City route to "junior" drivers. Instead, when they "put Ken on a different run that met all his criteria, we asked drivers who wanted to go to the city and got a volunteer."

Mr. Tagliente closed by saying, "It is very hard to find good dedicated drivers that really enjoy their work. Ken was one of those until lately."

*Mr. Wentworth's Load Summaries*
(CX 10 A to 10 H)

Between January 6 and August 16, 2004, Mr. Wentworth drove 13 to 24 loads each month. His last 12 runs in August 2004 were to IESI. The weight of his IESI loads that last month ranged from 20.9 to 33.52 tons. Only one load exceeded 31 tons.

*Mr. Arthur Dufore's Statement*
(CX 11)

On November 5, 2004, Mr. Dufore completed an OSHA written statement. He recalled that at the August 21, 2004 meeting, Mr. Wentworth complained that the new rate schedule required drivers to haul over 32 tons. Mr. Tagliente responded that if a driver loaded as much as he could but didn't meet the maximum, he wouldn't be penalized. Mr. Wentworth apparently didn't accept the explanation and continued to complain that the hours were too long and he couldn't make the route anymore. To complete the trip, he had to run over. Concerning this last

comment, Mr. Dufore noted the trucks had sleeper berths and drivers were not required back in the yard at any specific time.

Mr. Wentworth was taken off the New York run "because he felt he couldn't get back to the shop in time to work at his own shop."

On August 25, 2004, while Mr. Dufore and Mr. Tagliente were on a trip, Dave (a dispatcher) called and informed them that Mr. Wentworth did not want to take any of the trailers at Agawam. Mr. Tagliente indicated Mr. Wentworth had two choices: he could go to New York City or ride back with another driver. Mr. Dufore heard no mention of Mr. Wentworth being laid off pending receipt of permits. When Mr. Dufore and Mr. Tagliente returned to the yard at 5:00 p.m., they saw Mr. Wentworth's tractor and trailer.

The next day, Mr. Dufore heard an argument between Mr. Peter Tagliente and Mr. Wentworth. Mr. Tagliente asked Mr. Wentworth why he brought the trailer back empty rather than ride with another driver. When Mr. Dufore went to see what was going on, he observed that "Kenny (Mr. Wentworth) was screaming and Pete (Mr. Tagliente) never raised his voice. Kenny just got right into his face . . . After several minutes of the yelling and screaming, Kenny left." Mr. Wentworth returned 20 minutes and "started again," saying he had called DOT and Mr. Tagliente was going to lose his job.

Mr. Dufore concluded, "Normally, a driver wouldn't get fired for coming back empty. He would have been written up and suspended for a few days. Kenny was terminated for what he did and said with Pete."

*Mr. John M. Wallace's Statement*
(CX 13)

In a November 5, 2004 statement, Mr. Wallace indicated he is a dispatcher for We Care. On August 25, 2004, when he arrived for his shift, Dave (Mr. Salato) told him that Mr. Wentworth would be returning with another driver. After Mr. Wentworth discovered no trailers for which he was permitted, he was given the options of getting a live load or returning with another driver. Around 1 to 3 p.m., Mr. Wentworth returned in his tractor with an empty trailer. After parking the vehicle, he turned in his paperwork at the dispatcher office. At that time, Mr. Wallace told him that he'd have to talk to Pete (Mr. Tagliente). Around 4 to 5 p.m., Pete returned to the yard and Mr. Wallace told him about Mr. Wentworth returning on his own. Mr. Tagliente did not respond.

The next day, late morning or early afternoon, Mr. Wentworth came into the building and went upstairs to Mr. Tagliente's office. Later, they both came downstairs and Mr. Wentworth put his phone on the desk and walked out. About 60 seconds later, Mr. Wentworth came back in. "Ken walked up to Pete and got right into his face and shook his finger in Pete's face. Ken was very hostile toward Pete. His finger was within a 1/4 inch of Pete's face." Being about three feet away, Mr. Wallace didn't know what to do. "Ken's actions were threatening." He believes he should have called the sheriff's office. The sheriff was called the next day because they expected Mr. Wentworth to return for his last paycheck.

Mr. Wallace believes, "it was Art (Mr. Dufore) who told me that Kenny was being switched from New York City to somewhere up here. Kenny was concerned about safety and that's why he was switched." The New York City run was 600 miles per day. Permitted trucks could run 55 miles per hour; un-permitted trucks could go 65 miles per hour. Mr. Wallace believes Mr. Wentworth was concerned about running legal. The change in routes "wasn't punishment, it was a way to take care of the problem."

In the spring of 2004, We Care ran about 12 to 14 trucks a day to New York City. By late September of that year, the company was down to one truck a day.

*Mr. Peter Tagliente's Statement*
(CX 14)

In a November 5, 2004 statement, Mr. Tagliente identified himself as the general manager for We Care. On August 25, 2004, Mr. Dave Salato called Mr. Tagliente and told him that Mr. Wentworth wasn't permitted for the trailers as Agawan and he wouldn't take any of them. Mr. Tagliente told Mr. Salato that Mr. Wentworth had two choices. He could go to New York City for a load or come back to the yard with another driver. A few minutes later, Mr. Wentworth called Mr. Tagliente. After Mr. Tagliente gave him the two options, Mr. Wentworth decided to leave the truck and come back with another driver to the company. Mr. Tagliente doesn't recall any discussion about a layoff until permits arrived. When Mr. Wentworth told Mr. Tagliente "on the 25th" that he couldn't take the New York City load because it would take too long, Mr. Tagliente "equated that" to Mr. Wentworth not making it back home in the afternoon to work at his own business, not that he would be over hours. After his conversation with Mr. Wentworth, Mr. Tagliente called Mr. Salato and let him know the truck and trailer would remain in Agawam.

Later that afternoon, Mr. Wallace called Mr. Tagliente and told him that Mr. Wentworth had returned with his tractor and trailer. Mr. Wallace told Mr. Wentworth that he would not be dispatched that night. Instead, he was directed to come in the next day to see Mr. Tagliente. That evening, Mr. Tagliente confirmed the events with Mr. Wallace and made a few notes. The next morning, he wrote the insubordination letter.

When Mr. Wentworth arrived, Mr. Tagliente had him read the letter. In response, Mr. Wentworth "blew up." He said Mr. Tagliente was going down and that their conversations had been recorded for weeks. Mr. Tagliente instructed Mr. Wentworth to turn in his phone and Mr. Wentworth left the office. Mr. Tagliente then went downstairs to tell Mr. Dufore, Mr. Salato, and Mr. Wallace about the termination. At that time, Mr. Wentworth came back in and "got right in my face" for about 2 to 3 minutes. Mr. Tagliente felt threatened. The next morning, he called the sheriff and filed a report about the incident.

At the August 21, 2004 meeting, Mr. Wentworth complained about the new rate schedule. He accused We Care of encouraging the company drivers to drive overweight. Mr. Tagliente disagreed but also noted that if the drivers did run over and carry extra weight the company would share the extra money with the drivers.

"While Kenny was employed here, he would talk to me about the need for him to get back here around noon so he could get to his shop in the afternoon." So, at the meeting, when Mr. Wentworth complained that the New York City route was taking too long, Mr. Tagliente "interpreted that to mean Kenny wasn't getting back to this yard in time for him to work at his shop. I didn't think Kenny was complaining about being over legal hours as much as not being home when he wanted to be."

*Group Health Insurance*
(CX 16)

Mr. Wentworth's group health insurance became effective from January 18, 2004 and was cancelled on August 31, 2004.

*We Care Conditions of Employment*
(CX 20)

In the We Care conditions of employment, the company requires its drivers to comply with all safety rules and regulations, the Federal Motor Carrier's Safety Regulations, and all state vehicular laws. The company also expected that each driver will "drive the posted State speed limit, or lower." "**We Care Transportation** at no time expects any Driver to disobey any vehicular law, and disciplinary action from the company may occur for repeat offenders."

The company has a three step approach to discipline, subject to the discretion[9] of the management. For the first offense, an employee may receive a written warning and 30 days probation. The second offense may lead to a written warning and 3 day suspension. The third offense may cause termination of employment.

Prohibited conduct includes: falsification of company and trip documents, gross insubordination, theft of company and customer property, and damage to company property.

*DOT Inspection*
(CX 28 B, RX 3, and RX 4)

On November 17, 2004, the U.S. Department of Transportation ("DOT") issued an inspection report for We Care. With 49 interstate drivers, the company had a fleet of just over 60 truck and tractors and 162 trailers. We Care "transports garbage from transfer stations in New York City, Massachusetts and Connecticut to landfills in upstate New York." The company also hauls waste sludge locally. Upon inspecting 214 records, and comparing driving logs with EZ-Pass records and weight tickets, the DOT found 8 violations concerning driving over hours and 19 on-duty over hours. A review of 165 records also revealed 7 weekly over hours violations. DOT also found several examples of falsified records. On one occasion, a driver who reported in his log as being off-duty had actually made a 641 mile round trip to Brooklyn, New York. The company's accident rate of 0.561 fell within the requisite range of 0.0 to 1.5 for a satisfactory rating.

[9]Though the document states, "Disciplinary actions are at the desecration of Company management, " I believe the firm means discretion rather than desecration.

Though the inspection revealed violations of the "11, 14, and 70 hours driving rules" and inaccurate or false driving records, the discrepancies did not reach critical levels. However, We Care:

> was close to being in critical violation for the 14 hours (on duty) rule, but the 16 hour exception had to be applied in some instances. Carrier's drivers are dispatched from and return to Jordan/Weedsport, New York on every trip. Occasionally, drivers will use their sleeper-berths to obtain some rest on the return portion of their trip. This is when most of the 14 hours violations were discovered.

To better control the hours of service and prevent further violations, DOT recommended that We Care not dispatch drivers "who don't have adequate hours available to complete assigned trips legally."

At the conclusion of the inspection, DOT gave We Care a satisfactory rating.

*Earnings Statements*
(CX 32)

Between January 3, 2004 and August 28, 2004, Mr. Wentworth received 16 biweekly earnings statements, which show an average gross pay of $1,754.

*Termination List*
(CX 34)

In a document showing the termination of 13 drivers between 2003 and 2005, several of the individuals were terminated after two or three accidents. Another driver lost his job after he missed five loads in four weeks. A driver was terminated after six days of no show/no call.

*Driver's Daily Log*
(CX 39)

On January 6, 2004, Mr. William Bush recorded in his driver's log, 15 minutes of on-duty time to unload in Waterloo, New York and 15 minutes to load in Danbury, Connecticut. On April 5, 2004, Mr. Bush logged 3 1/2 hours to unload at Waterloo and 2 hours to load at Danbury.

*Overweight Ticket*
(CX 41)

On January 5, 2004, Mr. Wentworth received tickets for several overweight violations and the lack of an overweight permit. At the time, he was driving a vehicle combination with a gross weight of 92,800 pounds. A few months later, an attorney representing We Care appeared in court and was able reduce the fine of $1,435 to $460. On May 7, 2004, We Care paid the imposed find of $460.

*Driver's Logs*
(CX 42 and CX 43)

On December 6, 2003, Mr. Wentworth, departed Jordan, New York just after midnight and returned a little after six in the morning without reaching his destination of Westerfield, Massachusetts.

*Earnings Statement*
(CX 45)

For the week of November 3 to November 9, 2004, Mr. Wentworth earned a gross pay of $1,200 from SOS Enterprises.

*Earnings Statement*
(CX 46)

For the two week period of December 13 to December 26, 2004, Mr. Wentworth received $905 in gross pay from Pullins Truck Company.

*Recorded Conversations*[10]
(CX 15 and CX 47)

Mr. Wentworth asks Mr. Dufore why he was no longer on the New York City run. Mr. Dufore replies "there just wasn't a load." However, after Mr. Wentworth observes that three new guys went to New York City. Mr. Dufore states "they wanted the Court Street guys to go."

On August 23, 2004,[11] Mr. Wentworth tells Mr. Tagliente that he didn't mean to get anyone ruffled by his comments at the Saturday meeting. Some of the drivers told him people believed he caused trouble. Mr. Tagliente indicates that no one was ruffled; he believed Mr. Wentworth was asking legitimate questions, adding driver's safety was important. Mr. Wentworth then expresses his shock at losing money under the new rate system despite Mr. Dufore's assurances. He explains that he is only permitted for 100,000 pounds (31 tons). Mr. Tagliente indicates the company is attempting to obtain many more permits for its trailers. However, it's an involved process and very difficult to please all the drivers. Mr. Wentworth hopes that he wasn't pulled off the New York City run because someone was mad at him. He didn't mean to offend anyone. Mr. Tagliente explains that the landfill is running out of room so everyone is cutting back based on seniority; "it trickled down" and the trucks were sent out of Court Street. He added, "That's what happens. As to you go getting moved. That's sort of nothing saying to me saying punishment for Wentworth, nothing at all."

[10]Following the first day of the hearing, having heard the testimony of Mr. Dufore, Mr. Tagliente, and Mr. Wentworth, I listened to the actual tape recording and clearly recognized the voices of Mr. Dufore, Mr. Tagliente and Mr. Wentworth.

[11]Based on Mr. Wentworth's statement on the tape recorder.

Mr. Wentworth further states, "I knew there were some way that we're running that gonna be a liability if somebody dies. . . A lot of loads are coming out of there illegal." Mr. Tagliente replies, "They shouldn't be. They should be running at their permit. Now granted, let's say its 104,200 pounds, ok? They give you ten percent over your permit. And that's what Tommy[12] says. You run out of there if you're at a 104,000." Mr. Wentworth then queries "They're not going to give you a ticket?" Mr. Tagliente answers:

> You can run at, okay, you run home, hit the landfill dump. You wanna know something? Rather than you screwing around backing up, trying to take a ton off or whatever the [expletive deleted] it is, I made extra money, the company made extra money, I'm going to give you a gift, alright? Everybody blew that out of proportion saying that we're gonna pay you more to run illegal. I mean, that was never written down. All that was a gift saying you know that if the guys are gonna run an extra ton that I am going to do something for my guys to keep my guys the happiest g-- damned drivers in the world. And is seems like ever since we've done that, we've caused nothing but problems with three or four g -- d --- drivers that cannot understand English.

Mr. Wentworth then mentioned a driver who was taking 6.5 hours to get to the landfill and 5 hours to return to the yard, a total of 11.5 hours. In Mr. Wentworth's opinion, "he can't run it legal. You know, and it's just, I understand . . . I didn't mean to cause a fight. I just wanted you to know . . . I gotta run 73 miles an hour to get my load done in 10 and 3/4 hours. Which is ok. I mean I don't give a s---, but I'm thinking what if somebody [expletive deleted] runs into me and dies. They're going to check [expletive deleted] everything." Mr. Tagliente responded, "You know, I don't know what to tell you . . . Laws are written that way, and everybody cheats . . . state troopers don't even look at ya unless you're going 74 miles per hour. I don't know why." Mr. Wentworth wasn't bothered by the situation just concerned about what would happened if somebody died. Mr. Tagliente replied then Mr. Wentworth was in the wrong business. Mr. Wentworth indicated that he liked his job and asked to be put back on the New York City run. "Can you take one or the new guys off of New York? Does it have to be me?" Mr. Tagliente starts to answer that he and Mr. Dufore will get together, but Mr. Wentworth cuts him off with "All right, well I'll just wait and see what happens. All right?"

In another conversation, a person tells Mr. Wentworth that he doesn't believe Pete (Tagliente) was the person who took him off the New York route. "Pete told me he didn't do it." According to this person, Mr. Tagliente said Art (Mr. Dufore) took him off and put him on Agawam because of his complaints at the Saturday meeting. Mr. Wentworth indicated that Mr. Tagliente told him he had to talk to Art before getting back on the New York City run.

In another conversation, Mr. Wentworth asks Mr. Salato[13] if there is a trailer he can pull that isn't overweight. When Mr. Salato says no, Mr. Wentworth asks what he is supposed to do and states, "I'm not going to haul an overweight trailer." Mr. Salato responds, "Since when did that come about? You never say a word about it until just now." Mr. Wentworth explains, "I

[12]The company co-owner is Mr. Thomas A. Jarrad (*see* CX 26 B).

[13]The context of this conversation and the name "Dave" identifies the other speaker as Mr. Salato.

said something at the meeting, Dave. And I got jumped on for it and I, you know, I don't know how to explain it – these are overweight. Why should I have to pull an overweight trailer? I don't wanna. If you ain't got a legal load, what do you want me to do?" Mr. Salato indicates that he is waiting to hear from either Mr. Dufore or Mr. Tagliente. At this point, Mr. Wentworth talks to himself noting there are no legal loads at Agawam; the three trailers weigh 92,000, 105,000 and 106,000 pounds. He observes David Stockmeyer, who has an airline problem, hooking up the 105,000 pound trailer. Mr. Jim Bodine, who has a hand brake problem, is attaching the 106,000 pound trailer. When Mr. Tagliente calls, Mr. Wentworth asks, "Then I can haul legal, right?" Mr. Tagliente answers, "Yep, ok, uh, clean out your truck, take your personal stuff, uh, leave the truck and everything there at Agawam and hitch a ride back with either Stockmeyer right there or Jim Bodine." Mr. Wentworth replies, "Alright."

*Safety Bonus Reduction Notices*
(CX 51 and CX 53)

On October 23, 2003, Mr. Tagliente reduced the 2003 safety bonus of a driver by $500 and placed her on 6 months probation. The company had just received notice from state environmental authorities that the driver had been involved in a sludge spill. The incident was the third spill in two years involving this driver.

On December 10, 2004, Mr. Tagliente reduced or eliminated the annual safety bonuses for several drivers. One driver lost $200 for an accident, "paperwork problems," and speeding. For losing control of his vehicle and causing $8,000 in damages to a guardrail, speeding through an EZ-Pass station, and hitting another truck causing $1,200 in damages, a driver lost his annual safety bonus. Mr. Tagliente reduced a driver's safety bonus by $200 for 10 missing paperwork write-ups, removing a fuel key, and taking a truck to go shopping "without authorization." Another driver lost $500 bonus money because due to a failure to check paperwork, he made a trip with an empty trailer, which caused We Care to incur "[o]verhead for the tractor, fuel and tolls for the extra axles that went down the thruway with no revenue generated." Due to two customer complaints and a speeding ticket for 75 miles per hour, a driver lost $300 from his safety bonus.

*Disciplinary Letters*
(CX 51 and CX 53)

On June 27, 2002, due to insubordination, Mr. Tagliente issued a warning letter, eliminated a monthly safety bonus, and suspended for one day a driver who was in his 60 day probation period. The driver failed to follow the dispatcher's directions for a certain route. The dispatcher was attempting to comply with the company president's directions to minimize fuel consumption, reduce tolls and mileage. Mr. Tagliente stated, "Because of your decision, none of this happened." Indicating that "We Care Transportation drivers are expected to follow directions to the letter," Mr. Tagliente characterized the driver's failure to follow directions "gross disrespect" and "insubordination."

Also, on June 27, 2002, Mr. Tagliente issued another warning letter and one day suspension to a driver who failed to follow the dispatcher's direction to a customer's location.

Mr. Tagliente again referenced the company's efforts to reduce costs. Additionally, the driver had an earlier incident of failing to follow instructions to return with an old tire for credit. Mr. Tagliente emphasized that further disciplinary action might include additional time off without pay or termination.

On June 27, 2002, Mr. Tagliente eliminated a monthly safety bonus and issued a warning letter to a driver for insubordination. While on a trip, the driver was radioed and "given directions to travel to another account to maintain customer satisfaction." The change in route was not far from the driver's location. However, the driver refused the assignment "which is gross disrespect and insubordination." As a result of the driver's refusal, We Care "did not meet our commitments at the scheduled time and We Care Transportation had to make amends." Mr. Tagliente stated, "You, as well as all employees, are expected to follow directions from your immediate supervisor."

On August 2, 2002, Mr. Tagliente issued a "Formal" warning letter to a driver for several incidents of failing to show up as scheduled, not fulfilling his performance promises, and being excessively unavailable to drive.

On November 19, 2002, Mr. Tagliente issued an insubordination letter to a driver who contrary to instructions "dropped and hooked" a trailer rather than live load his trailer. The driver also forfeited $150 in his quarterly safety bonus. According to Mr. Tagliente, "We Care Transportation can not afford nor will tolerate employees doing what they feel like doing rather than doing there [sic] job the way it is told."

On November 27, 2002, Mr. Tagliente terminated a driver for failure to follow directions and "continuous problems with equipment." The driver had been given a final warning letter several months earlier. Due to his recent inappropriate operation, the driver again damaged truck equipment.

On January 29, 2003, Mr. Tagliente issued a "final" letter of warning to a driver who refused to do a load two days earlier. The driver was already on a 6 month probation Mr. Tagliente warned that "if there is another occurrence where you do [not] follow policy or refuse to do what you are dispatched to do, you will be terminated from We Care Transportation." The company would not tolerate drivers telling it "what they will or will not do."

On August 22, 2003, Mr. Tagliente issued a warning letter to a driver who had been involved in his second accident which was causing the company's insurer to review his record. The driver's first accident had cost $4,500. Due to the accidents, the driver forfeited his 2003 safety bonus, was suspended for three days, and placed on 90 day probation. Mr. Tagliente warned, "If you have any accident or incident during this time, it will be grounds for immediate termination."

On December 15, 2003, Mr. Tagliente gave an insubordination warning letter to a driver. For two days in a row, the driver was "late without any phone calls to Dispatch." Additionally, when Mr. Tagliente asked why he was not already at a customer's location, the driver lied about when the customer's loading dock opened and the time he spent warming the truck. Mr.

Tagliente said, "This it total insubordination being late and lying to me. If there are more incidents of lateness, lying or anything else that has a detrimental effect on We Care, it will be grounds for suspension without pay, which will lead to termination."

On June 10, 2004, Mr. Tagliente terminated a new driver who was on a 60 day probation because he failed to yield the right of way to a state trooper, causing the trooper to lock his car's brakes. Within the prior two weeks, the driver had also been identified for unsafe operation and failing to yield the right of way.

On September 7, 2004, Mr. Tagliente placed a driver on 30 day probation for calling in sick about one day a week for four weeks.

*Overweight Tickets*
(CX 55)

Between January 4, 2004 and September 3, 2004, We Care paid 70 overweight tickets ranging from $22 to $2,310 and totaling $60,585. The vast majority of citations involved loads exceeding the gross weight limit of 80,000 pounds. The largest excess was a load weighing 106,850 pounds.

*Mr. Wentworth's STAA Complaint*
(RX 1)

On August 24, 2004, Mr. Wentworth complained to OSHA that We Care had violated Section 405 of the STAA due to a complaint he made on August 21, 2004. According to Mr. Wentworth, at an August 21, 2004 safety meeting, he complained to management about having to drive over hours and with overweight vehicles. After the meeting, his normally assigned route to New York City was given to junior drivers and he was assigned to a local, less-paying route. A note at the bottom of the complaint form indicates that Mr. Wentworth was terminated on August 26, 2004.

*We Care Safety Bonus Program*
(RX 2)

We Care established a safety bonus program for its drivers in 2003 and 2004. An annual bonus of up to $1,300 was available if a driver did not have any lapses the areas of safety, communications, fuel savings, reliability, and equipment appearance.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Adjudication Principles

The employee protection provisions of the STAA, 49 U.S.C. § 31105, prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. In order to invoke these whistle blower provisions of the STAA, a complainant has the burden of proof to establish the respondent took adverse employment action because the complainant engaged in one of the STAA's protected activities. The analysis for determining whether a complainant meets his or her burden of proof is derived from the long, and continuing, line of Federal employment law discrimination cases.

As set out in exhaustive detail by the U.S. Circuit Court of Appeals for the Eleventh Circuit, in *Wright v. Southland Corp*., 187 F. 3d 1287 (11th Cir. 1999), a complainant may take two fundamental approaches to establish unlawful discrimination. First, relying on the traditional approach, a complainant may attempt to prove by direct evidence that more likely than not, the employer engaged in unlawful discrimination. *Id*. at 1289. If in response, the employer also provides evidence of legitimate purposes for its actions, then the case becomes a "mixed motive" case and the burden of persuasion shifts to the employer to demonstrate, as an affirmative defense, by a preponderance of the evidence, that it would have taken the same action, in the absence of the discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 to 255 (1989) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

Since directly proving an employer's intent of illegal discrimination may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination. *See Wright*, 187 F. 3d at 1290 and *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The ARB has applied this approach in STAA cases and in *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), recently summarized the burdens of proof and production in this type of case:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. At 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F. 3d 261, 277 (7th Cir. 1995). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

The ARB in a footnote to the above paragraph provided further explanation on this last phase of the adjudication process:

> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center*, 509 U.S. at 510-511. *See Carroll v. United States Dep't of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996).

The United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc*. 120 S. Ct. 2097 (2000), provided further explanation of the pretext phase of the analysis introduced in the *St. Mary Honor Center* case. The court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. In meeting that ultimate burden, the complainant may, but not necessarily, prevail based on the combination of a prima facie case and sufficient evidence to demonstrate the asserted justification is false. In light of the false justification, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 120 S. Ct. at 2108. In other words, there may be an inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

At this point in the adjudication, "the fact-finder may then consider the credibility of parties' evidence establishing the complaint's prima facie case and inferences properly drawn there from in deciding that the respondent's explanation is pretext." *Regan v. National Welder Supply,* 03-STA-14 (ARB Sept. 30, 2004).

Concerning witness credibility, all factual findings, including credibility findings must be supported by substantial evidence in the record as a whole. *NLRB v. Cutting, Inc*. 791 F.2d 659, 667 (7th Cir. 1983). At the same time, the Secretary has observed that a lack of evidence to corroborate conflicting testimony on an issue, coupled with an inability to discern the truth through the demeanor of the witnesses, may lead to an inability to find a complainant's version of the facts more credible. In that case, there may be an insufficient basis for finding a prima facie case. *Cook v. Kidimula International, Inc*. 95 STA 44 (Sec'y Mar. 12, 1996).

Finally, in cases in which an employer engaged in an adverse personnel action motivated by both prohibited and legitimate reasons, the employer escapes liability only by establishing by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. *Moravec v. HC & M Transportation, Inc.* 90 STA 44 (Sec'y Jan. 6, 1992) and *Logan v. United Parcel Service,* 96 STA 2 (ARB Dec. 19, 1996). Where evidence demonstrates that other employees, similarly situated, did not receive the same adverse personnel action, the employer may fail to carry its burden to show it would have discharged the complainant even if he had not engaged in protected activity. *Clifton, v. United Parcel Service,* 94 STA 16 (Sec'y May 9, 1995). At the same time, under this dual motive analysis, if the employer carries its burden of persuasion, then even when an employee engages in protected

activity, an employer may still legitimately discipline him for insubordination and disruptive behavior. *See Logan,* 96 STA 2.

With these principles in mind, I first note that Mr. Wentworth provided evidence to establish a *prima facie* case of illegal discrimination. In his testimony, Mr. Wentworth indicated that he raised commercial vehicle safety concerns related to his assigned route to Mr. Tagliente, his supervisor, on August 21, 2004. The next day, Mr. Wentworth was reassigned to a route that generated less income for Mr. Wentworth. Additionally, on August 24, Mr. Wentworth refused to haul a trailer for which he was not properly permitted. The next day, Mr. Tagliente terminated his employment. This evidence presents the prima facie elements of protected activities, knowledge of the employer, adverse personnel actions and an inference of causation due to temporal proximity.

In turn, We Care has produce evidence of legitimate reasons for the two personnel actions. Mr. Tagliente indicated the route re-assignment was taken at Mr. Wentworth's request and to accommodate his personal business enterprise. And, Mr. Tagliente fired Mr. Wentworth for insubordination because he returned to We Care with an empty trailer on August 24, 2004 without informing him, costing the company several hundred dollars.

Due to We Care's production of evidence showing non-discriminatory reasons for its personnel actions involving Mr. Wentworth, the inference of causation between his protected activities, route reassignment and employment termination "simply falls away." As a result, I will consider the entire record, render credibility and probative value determinations, make factual findings, and determine whether Mr. Wentworth has carried his ultimate burden of proof by a preponderance of the evidence to show: a) he engaged in an STAA protected activity; b) he suffered an adverse personnel action; and, c) the protected activity was the reason for the adverse personnel action. *See Anderson v. Jaro Trans. Services & McGowan Excavating, Inc.,* 2004 STA 2 and 3, (ARB Nov. 30, 2005).

## Stipulations of Fact

At the hearing, the parties stipulated to the following facts: Mr. Wentworth's discrimination complaint under the STAA was timely filed and at the time of the alleged incidents, an employee-employer relationship existed between the parties (TR, page 7).

## Specific Findings

Based on the preponderance of the essentially undisputed evidence, I find that:

December 1, 2003 Mr. Wentworth joins We Care as a truck driver. At the time, he is not permitted to drive a tractor-trailer combination in excess of 80,000 pounds, which equates to an effective load of 22 tons. The speed limit on this vehicle combination is 65 miles per hour.

January through May 2004 Mr. Wentworth continues to haul garbage and sludge for We Care. His driving assignments include frequent trips to New York City. The New York City route is a round trip from the We Care yard in Jordan, New York. Mr. Wentworth pulls

overweight loads and is ticketed at least once in January 2004 for driving an overloaded trailer. Mr. Wentworth averages five New York City runs a week.

June and July 2004 On June 16, 2004, Mr. Wentworth receives a permit to haul a gross weight of 100,060 pounds. The speed limit for the permitted trailer is 55 miles an hour. The permit system establishes the appropriate load limits for specific tractors and trailers to ensure proper load distribution between the vehicles' axles and sufficient braking capacity. In order to complete the New York City route within the 11 hour duty limit established by DOT, and to enable him to make five runs a week, Mr. Wentworth exceeds the permitted speed limit. Sometimes, when Mr. Wentworth does not have the proper permit, he continues to drive overweight loads.

July 26, 2004 Mr. Jarrard, a We Care part-owner, publishes a new rate schedule for the New York City, IESI, route. Drivers hauling 32 tons will receive 24% of the load's gross receipt. For loads under 32, the driver's share drops to 20%. For the New York City runs, the new rate structure means a driver pulling 32 tons may make up to $260 for the trip. At less than 32 tons, the same trip yields about $202 in driver compensation.

Upon recent of his first paycheck under the new rate structure, Mr. Wentworth receives less pay than he had with the prior flat rate system. Previously, he made about $232. With new system, he earned $160.

August 21, 2004 Concerning the content of Mr. Wentworth's comments regarding the new rate structure discussion, the witnesses had slightly varied and less than complete recollections.

In his initial STAA complaint and hearing testimony, Mr. Wentworth indicated that he complained about having to drive over hours and overweight. He also expressed a concern about drivers speeding with the permitted trailers. He specifically indicated that they had to run 73 miles an hour with trailers limited by permit to 55 miles an hour in order to complete the run within 11 hours. Finally, Mr. Wentworth asked who would be liable in the event that an accident occurs while the driver is speeding or hauling overweight.

On the other hand, Mr. Dufore only recalls that Mr. Wentworth raised a concern about pulling overweight trailers out of New York City. Mr. Wentworth also indicated that in order to complete the runs, he would have to run over hours.

Likewise, Mr. Cummins could only specifically recall Mr. Wentworth's mention of criminal negligent homicide.

However, Mr. Bush,[14] Mr. Waldron, and Mr. Tagliente essentially confirm Mr. Wentworth's recollection. According to Mr. Bush, Mr. Wentworth indicated drivers had

[14]I am not unmindful of the potential veracity and bias issues associated with Mr. William Bush. However, considering the consensus of the other various witnesses to Mr. Wentworth's meeting statements, including the two major principals, Mr. Wentworth and Mr. Tagliente, I need not render a probative weight determination on Mr. Bush's his testimony on this subject.

difficulty making the route within the hours of service for a couple of reasons, including waiting time for the loads and the 55 mile per hour limit on permitted trailers. He was also worried about pulling trailers for which he was not permitted. Mr. Wentworth queried who would be responsible if someone was injured in an accident. Similarly, Mr. Waldron recalls that Mr. Wentworth had complaints relating to logbooks and overweight loads. He emphasized that it was difficult to drive his run legally log-wise. Mr. Wentworth noted that the trucks either didn't have permits or were hauled over their permits. Mr. Wentworth also voiced a concern about speeding. Finally, Mr. Tagliente remembers that Mr. Wentworth had concerns about the new rate structure. He also expressed problems about legal drive time and the amount of time required to return to the yard. He accused the company of encouraging drivers to drive overweight. Mr. Wentworth also complained about speeding and asked what would happen if he killed someone.

I note that the limited recollections of Mr. Dufore and Mr. Cummins do not necessarily represent contrary testimony such that I must render a credibility assessment at this point. Mr. Dufore indicated that he wasn't paying close attention and Mr. Cummins simply didn't remember the details. Consequently, testimony of Mr. Wentworth, Mr. Bush, Mr. Waldron, and Mr. Tagliente establish the specific statements made by Mr. Wentworth on at the August 21, 2004 driver's meeting.

Accordingly, I specifically find that on August 21, 2004, We Care conducts a safety meeting with its drivers. The drivers and the general manager, Mr. Tagliente, discuss the new rate structure. In response, Mr. Wentworth states that the new rate structure encouraged drivers to drive overweight. He also notes the New York City run was difficult to complete within the hours of service limitations and required the drivers to speed. Mr. Wentworth indicates he has to drive 73 miles an hour with a permitted trailer limited to 55 miles an hour in order to complete the run within the legal time. Mr. Wentworth asks who would be liable in the event he was involved in an accident that caused an injury.

**Witness Credibility and Probative Weight Determinations**

From the close of the drivers' meeting on August 21, 2004 through August 23, 2004, the three principal participants in the events, Mr. Wentworth, Mr. Dufore, and Tagliente, have significantly contrary recollection of the events. To a lesser extent, other collateral witnesses have varied accounts of the days' events. Consequently, after considering the parties' respective versions of the events presented through taped conversations, written statements, and sworn testimony, evaluating other aspects of the evidentiary record, and noting witness demeanor, I must make credibility and probative weight findings.

Mr. Wentworth

Taped conversations: (see entries under Mr. Dufore and Mr. Tagliente)

Hearing testimony: After the August 21, 2004 driver's meeting, Mr. Wentworth departed. On August 22, 2004, the night dispatcher, Mr. Dave Salato, told Mr. Wentworth that he would be going to Agawam instead of New York City that day. Upon return, Mr. Wentworth

asked the day dispatcher, Mr. Wallace, about the change. When Mr. Wallace said he didn't know, Mr. Wentworth went to see Mr. Dufore. Mr. Dufore said that Mr. Salato wanted drivers at a specific location to go instead of Mr. Wentworth.

The next day, on August 23, 2004, Mr. Wentworth asked Mr. Tagliente about the route change and requested to be put back on the run. Mr. Tagliente indicated that he didn't know why Mr. Wentworth was taken off the New York City run. Mr. Wentworth asked if Mr. Tagliente could find out and let him know. Mr. Tagliente indicated he would let Mr. Wentworth know. Mr. Wentworth also indicated that he wasn't trying to cause problems at the meeting; he was just concerned who would be responsible if someone were killed while the trucks were speeding or running overweight. Later, Mr. Tagliente called Mr. Wentworth over a two-way cell phone and told him that his route was changed because he was complaining at the Saturday meeting. According to Mr. Tagliente, if Mr. Wentworth wanted back on the New York City route, he had to talk to Mr. Dufore.

Mr. Dufore

Taped Conversation (sometime during August 22 and 23, 2004): In response to Mr. Wentworth's question about why he is no longer on the New York City route, Mr. Dufore states, "there just wasn't a load." After Mr. Wentworth notes that three new drivers went on the New York City run, Mr. Dufore states, "they wanted the Court Street guys to go."

November 5, 2004 OSHA statement: At the August 21, 2004 meeting, Mr. Wentworth complained that the hours on the New York City run were too long and he couldn't complete the trip without running over. Mr. Wentworth was taken off the New York City run "because he felt he couldn't get back to the shop in time to work at his own shop."

Hearing testimony: Mr. Dufore removed Mr. Wentworth from the New York City run and placed him on the Agawam route because Mr. Tagliente had told him that Mr. Wentworth had requested the change in order that he could get back to his other business by the afternoon. After Mr. Tagliente told him about Mr. Wentworth's request, he asked if anything else was available and Mr. Dufore indicated that the Agawam run was available.

Mr. Tagliente

Taped conversation (August 23, 2004): Mr. Wentworth tells Mr. Tagliente that he wasn't trying to cause trouble at the Saturday meeting and hopes that he wasn't pulled off the New York City run because someone was mad at him. Mr. Tagliente replies that the landfill is running out of room so everyone was cutting back based on seniority and that trickles down so the three trucks were sent from Court Street. Mr. Tagliente did not view Mr. Wentworth's getting bumped to be punishment at all. Mr. Wentworth asks if he can replace one of the drivers and get back on the New York City route. Mr. Tagliente responds that he and Mr. Dufore will be getting together. Mr. Wentworth agrees to wait and see what happens.

In attempting to explain the basis for his concern about personal liability in the event of an accident, Mr. Wentworth claims drivers are pulling illegal loads. He also notes that he has to

drive 73 miles an hour to complete the New York City route. Mr. Tagliente explains that there is a 10% buffer over the load limit that the police only start enforcing the speed limit at 74 miles an hour.

September 23, 2004 correspondence: During his employment, Mr. Wentworth had expressed a desire to be done by 10 or 11 in the morning so he could get to his own personal business in the afternoon. "After the safety meeting on the 21st of August, Ken and I talked about another run to get him home quicker. Granted, he knew it would not pay as much but Ken seemed to be more concerned with time as opposed to pay . . . Together we agreed on a different run to help accommodate his daily schedule." When Mr. Wentworth returned on August 23d, he asked why he had been placed on this particular run. Mr. Tagliente explained that "it was what we all thought he wanted. This would ensure there would be no over hours driving, we gave him one of the night runs that he wanted which also ensured him to be able to get to his personal job at noon when he wanted to be there." The New York route was not given to junior drivers. Mr. Wentworth was put on a run that met all his criteria. Then, they asked for volunteers for New York City run and got other drivers.

November 5, 2004 OSHA statement: Mr. Wentworth complained about the new rate schedule at the August 21, 2004 meeting. During the course of his employment, Mr. Wentworth would tell Mr. Tagliente about his need to be back by noon so he could work in his shop in the afternoon. So, at the driver's meeting, when Mr. Wentworth complained that the New York City route was taking too long, Mr. Tagliente "interpreted" that to mean that once again he was complaining about not getting back in time to work in his shop. He didn't consider it to be a complaint about being over hours.

Hearing testimony: Mr. Wentworth was changed from the New York City route due to his stated concern to Mr. Tagliente about getting home on time. He raised that concern at the drivers' meeting. After the meeting, Mr. Tagliente discussed "the situation" with Mr. Wentworth. He believes Mr. Dufore was standing nearby. Mr. Tagliente didn't make the change, Mr. Dufore did it. Mr. Tagliente doesn't recall whether he told Mr. Dufore about Mr. Wentworth's concerns. However, Mr. Dufore was at the meeting so he believes Mr. Wentworth brought up the same problem, about being home on time, with Mr. Dufore. Later, when Mr. Wentworth asked about the route change, Mr. Tagliente told him, "that's what he wanted, to be home on time." Mr. Wentworth indicated that he disagreed with what Mr. Tagliente believed he wanted. Mr. Tagliente believed Mr. Wentworth was unhappy the New York City route because it interfered with his personal business. "The route change was done at Mr. Wentworth's request." At the Saturday meeting, Mr. Wentworth asked Mr. Tagliente to change the route because he needed to be home earlier. "We suggested something different, and he agreed, and he knew at the time it was a lower rate."

Mr. Waldron

Hearing testimony: After the Saturday drivers' meeting, Mr. Waldron overheard Mr. Dufore say the drivers were giving him problems complaining about overweight and over hours. Mr. Waldron heard Mr. Tagliente agree and say they were going to have to do something about

the situation. Mr. Waldron later told Mr. Wentworth about the exchange and told him to watch his back.

Mr. Wallace[15]

November 5, 2004 OSHA statement: Mr. John Wallace, the day dispatcher for We Care, was told by Mr. Dufore that Mr. Wentworth was being switched from New York City run because he was concerned about safety. Mr. Wallace didn't believe the route change was punishment; instead, "it was a way to care of the problem."

Mr. Wentworth, Jr.

Hearing testimony: Mr. Wentworth overheard Mr. Tagliente tell his father over the two way cell phone that his route was changed because of his complaints at the drivers meeting. Mr. Tagliente told Mr. Wentworth that if he wanted back on New York City, he had to talk to Art (Mr. Dufore).

Mr. Barker

Hearing Testimony: Mr. Barker overheard a conversation between Mr. Wentworth and Coach (Mr. Tagliente) that he had been placed on the Agawam route because of his meeting complaints. If he wanted back on the New York City route, Mr. Wentworth was told to talk to Art (Mr. Dufore).

Mr. Cramer

Hearing Testimony: Mr. Cramer overheard a conversation between Mr. Wentworth and Coach (Mr. Tagliente). Coach said that Mr. Wentworth had been placed on the Agawam route because of his meeting complaints. If he wanted back on the New York City run, Mr. Wentworth was told to talk to Art (Mr. Dufore).

Discussion

Considering first the collateral witnesses, I found the hearing demeanor of Mr. Wentworth, Jr., Mr. Barker, Mr. Cramer and Mr. Waldron to be generally straightforward and credible. While Mr. Cramer, Mr. Barker and Mr. Waldron are apparent friends of Mr. Wentworth, that relationship standing alone is not discrediting. I have also considered that Mr. Wentworth Jr. was testifying at his father's hearing. However, his obvious sincerity in answering all questions, direct answers, and candidness dispelled any credibility concerns I may have harbored due to his relationship with the Complainant. In regards to Mr. Wallace, since he

[15]CX 47 contains a taped conversation between Mr. Wentworth and purportedly Mr. Wallace who indicates Mr. Tagliente did not make the route change. That conversation is consistent with Mr. Wentworth's testimony that when he returned from Agawam he talked to the day dispatcher, Mr. Wallace, and the tape transcript identifies the speaker as Mr. Wallace. However, Mr. Wallace he did not appear before me at the hearing so I was unable to identify the voice in the audiotape as belonging to Mr. Wallace. Additionally, the context of the taped conversation didn't readily identify him. As a result, that portion of the taped conversation has little probative weight.

didn't testify at the hearing, cross-examination concerning his unsworn statement was not possible. As a result, his statement is not particularly probative.

Turning to the three principle witnesses about the event of August 21 to 23, 2004, Mr. Wentworth, as the complainant, has an obvious stake in the outcome of the litigation. However, in addition to credible demeanor, Mr. Wentworth's responses on both direct and cross examination were direct and given with little equivocation. In considering notable inconsistencies, I have noted at least one discrepancy between the contemporaneous taped conversation and his subsequent testimony. In his statements and at the hearing Mr. Wentworth indicated that in part of his August 25th discussion with Mr. Tagliente, they discussed his being laid off at that time pending receipt of additional permits by the company. However, the taped conversation between Mr. Wentworth and Mr. Tagliente does not contain any such reference. Upon consideration of the entire record, I do not believe this discrepancy adversely affects Mr. Wentworth's credibility as a witness. In other portions of the taped conversations, Mr. Tagliente mentioned at their earlier August 23d meeting that We Care was in the process of obtaining more permits for its trailers. Thus, I believe the difference is related to Mr. Wentworth's confusion at the hearing about the timing of their conversation about pending permits and does not represent an adverse reflection on his credibility. Consequently, I conclude Mr. Wentworth was a credible witness and give his testimony the appropriate probative weight.

Initially, Mr. Dufore's witness demeanor seemed straightforward and believable. However, in a couple of exchanges, he engaged in some equivocation and provided questionable responses in several areas that began to erode my confidence in his testimony. First, he stated that he didn't know why Mr. Wentworth was terminated. Yet, after acknowledging that in his earlier OSHA statement he stated Mr. Wentworth was terminated for what he did and said with Mr. Tagliente, Mr. Dufore indicated the OSHA statement only reflected his belief as to the cause of the termination.

Second, Mr. Dufore testified that back in August 2004 he was not aware that We Care drivers were pulling overweight loads. Yet, he also acknowledged that during that time frame the company was receiving overweight citations. As CX 55 starkly demonstrates from January 2004 to September 2004, We Care drivers were cited 70 times and incurred over $60,000 in fines for pulling overweight loads. In the face of those innumerable citations, Mr. Dufore's testimony presents a nonsensical assertion that as the operations manager at that time, he was unaware of this significant problem.

Third, Mr. Dufore asserted that none of the We Care drivers were required to exceed the hours of service limitations because they had sleeper berths in their trucks. He stressed there was no penalty if a driver didn't make it back (that is, rested before returning to the We Care yard) and only got four rather than five runs a week. Yet, on cross-examination, Mr. Dufore indicated We Care does not have any drivers who regularly pull only four loads a week. Additionally, other driver witnesses testified that it was not possible to use the sleeper berths and still get in five runs a week.

While my analysis of Mr. Dufore's hearing responses may be just a misunderstanding on my part of what he was trying to say, a more significant issue adversely impacts on Mr. Dufore's

credibility. In his November 2004 statement, Mr. Dufore stated that Mr. Wentworth was taken off the New York City route because he couldn't get back in time to work in his shop. In his sworn testimony, Mr. Dufore presented the same rationale and stated that he made the determination to change Mr. Wentworth's route because Mr. Tagliente told him that Mr. Wentworth had indicated to him that he needed to be back by noon so he could get to his own business. Significantly, Mr. Dufore further testified that after the first run, when Mr. Wentworth asked him why he had been taken off the route, Mr. Dufore specifically replied the change was made so that he could be back by noon for his business.

However, in the contemporaneous recording of their conversation after Mr. Wentworth's first run to Agawam, Mr. Dufore's first answer to Mr. Wentworth's route change inquiry was that "there just wasn't a load." When Mr. Wentworth then asked why three young drivers had been just been sent on the run, Mr. Dufore next indicated because "they wanted the Court Street guys to go." Notably absent in either of Mr. Dufore's responses to Mr. Wentworth's questions is the explanation that Mr. Dufore asserted at the hearing he gave Mr. Wentworth that day when he asked about the change in his schedule. To state the obvious, the tape of their actual conversation does not support Mr. Dufore's hearing assertion that he told Mr. Wentworth the change was made so he could get back in time to work in his business. I have considered the possibility that the tape did not contain their entire conversation that day. However, I note that although the tape transcript was admitted before the close of the hearing, Mr. Dufore was not recalled to explain this glaring disconnect between the actual conversation he had with Mr. Wentworth and his testimony about their exchange.

Accordingly, considering Mr. Dufore's equivocation and principally based on the inconsistency between the taped conversation and Mr. Dufore's testimony about their discussion, I have diminished confidence in his credibility and correspondingly give his testimony less probative weight.

Finally, while understandably defensive at times to complainant's counsel's questions, Mr. Tagliente's initial presentation was not particularly questionable. However, in a manner similar to Mr. Dufore, Mr. Tagliente eventually engaged in equivocation, and significant inconsistencies exist between the tape of his actual conversations with Mr. Wentworth and his OSHA statements and hearing testimony.

In terms of equivocation, Mr. Tagliente testified that We Care drivers do not haul overweight loads. When presented with the overweight citation summary and cumulative fines, Mr. Tagliente asserted those citations were probably attributable to preloaded trailers so the violations were not really the drivers' fault. Upon further questioning, Mr. Tagliente acknowledged that the trailers would have its weight listed on it so a driver would know if it was overweight. Next, Mr. Tagliente indicated that since Mr. Wentworth had a sleeper berth in his truck, there was no requirement for him to speed on New York City route to ensure compliance with hours of service. According to Mr. Tagliente, Mr. Wentworth wasn't forced to make five runs a week; he forced himself to be home everyday. However, when asked about the normal We Care dispatch for Mr. Wentworth, Mr. Tagliente replied, five times a week.

A significant discrepancy also exists between the tape recording of Mr. Tagliente's conversation with Mr. Wentworth and his two written statements and hearing testimony. In his September 2004 statement, Mr. Tagliente stated that he and Mr. Wentworth talked after the drivers' meeting about his doing another run to get him home quicker. Mr. Wentworth knew he'd make less money but was more concerned about getting back earlier. "Together they agreed a different run might help to accommodate his schedule." When Mr. Wentworth later asked about why his route was changed, Mr. Tagliente told him it's what they thought he wanted. They gave him a night run to ensure he'd be back by noon.

Two months later, in November 2004 statement, Mr. Tagliente altered his recollection a bit and explained that he interpreted Mr. Wentworth's comments at the drivers' meeting to mean Mr. Wentworth was again concerned about getting by on time.

In his sworn testimony, Mr. Tagliente reverted to his September 2004 version of the events of August 21 to August 23, 2004. After the drivers' meeting, Mr. Wentworth discussed his situation and need to get home on time with Mr. Tagliente. Mr. Wentworth asked Mr. Tagliente to change his route in order that he could get home earlier. A change was suggested and Mr. Wentworth agreed to it, even though it involved less pay. When Mr. Wentworth later asked him about the change, Mr. Tagliente responded that the route change was "what he wanted, to be home on time." Mr. Wentworth told Mr. Tagliente that he was mistaken about what he wanted.

However, the tape of the August 23, 2004 conversation between Mr. Tagliente and Mr. Wentworth chronicles a different exchange. When Mr. Wentworth asks about the route change, Mr. Tagliente explains that the landfill is running out of space so the company is cutting back. Mr. Tagliente assures Mr. Wentworth that the change is not punishment. When Mr. Wentworth asks to be placed back on the route, Mr. Tagliente states he'll discuss it with Mr. Dufore. Also when Mr. Wentworth says he hoped the change wasn't because of his complaints, Mr. Tagliente responds that it's not punishment. Profoundly absent in this exchange is any mention by Mr. Tagliente of their purported agreement two days earlier that Mr. Wentworth would get a different route in order to get back sooner, or Mr. Tagliente's claim that they were just trying to do what Mr. Wentworth wanted. Had either such an agreement or goodwill intention existed, surely those were the most likely and reasonable responses to Mr. Wentworth's question about the route change, rather than the actual explanation that landfill was filling up and a simple assurance the change is not punishment.

Considering Mr. Tagliente's occasional less than candid responses, the significant discrepancy between his testimony and the taped conversation of the August 23, 2004 conversation with Mr. Wentworth upon his return from Agawam, and an absence of any explanation for the different versions, I conclude that he was not a particularly credible witness. As a result, his hearing testimony has diminished probative value.

## Additional Specific Findings

My credibility determinations and lack of confidence in the accuracy of the testimonies by Mr. Dufore and Mr. Tagliente leads me to the following conclusions about the conflicting

versions of what occurred after the drivers' meeting on August 21 through August 23. First, I find that after the drivers' meeting, Mr. Wentworth did not ask Mr. Tagliente to change his route from the New York City run in order that he could return by noon for his own business. Next, correspondingly, Mr. Tagliente did not discuss with Mr. Dufore a change in Mr. Wentworth's route due to a request to be home earlier in the day.[16] Third, I believe the recollection of Mr. Wentworth and the tape recording more accurately depict the conversations that occurred between Mr. Wentworth, Mr. Dufore and Mr. Tagliente from the end of the drivers' meeting on August 21, 2004 through August 23, 2004. Accordingly, based on the preponderance of the more probative, credible evidence and testimony, I additionally specifically find that:

August 21, 2004 After the drivers' meeting, Mr. Wentworth left without making a route change request to Mr. Tagliente or Mr. Dufore. Mr. Waldron overhears Mr. Dufore and Mr. Tagliente discussing a need to do something about the drivers' complaints concerning speeding and driving overweight.

August 22, 2004 Mr. Dufore changes Mr. Wentworth's route assignment. Instead of going on the New York City run, Mr. Wentworth is assigned a run to Agawam.

August 23, 2004 Mr. Dufore tells Mr. Wentworth that the route change was caused first due to the absence of a load and then by a specific request for certain drivers. Mr. Tagliente tells Mr. Wentworth that the route change was caused by a reduction in loads due to the landfill running out of space. Mr. Wentworth asks to be placed back on the New York City route and Mr. Tagliente indicates that he'll meet with Mr. Dufore. Later, Mr. Tagliente calls Mr. Wentworth and tells him that his route was changed due to his complaints at the drivers' meeting and that if he wants back on the New York City route, he has to talk to Mr. Dufore. In his conversation with Mr. Tagliente, Mr. Wentworth also observes that We Care drivers are pulling illegal loads and that he has to drive 73 miles an hour to complete the New York City route.

August 24, 2004 Mr. Wentworth contacts OSHA about his unfair treatment by We Care.

August 25, 2004[17] When Mr. Wentworth arrives in Agawam, he discovers that he does not have a permit for any of the loaded trailers. He calls the night dispatcher, Mr. Salato, and tells him that he is not going to pull anything illegal. In his initial response, Mr. Salato asks why Mr. Wentworth is complaining about overweight loads at this time. Mr. Wentworth notes that after he complained at the meeting, he's been in trouble. Mr. Salato confirms no legal loads are available and advises that he is waiting to hear from Mr. Tagliente. Eventually, Mr. Tagliente gives Mr. Wentworth two choices; he may either go to New York City for a live load or ride

[16]Based on this determination, I need not address the inconsistency between Mr. Dufore's testimony and Mr. Tagliente's recollection. According to Mr. Dufore, he changed Mr. Wentworth's route after Mr. Tagliente told him after the drivers' meeting about Mr. Wentworth's request to be back by noon and Mr. Tagliente's inquiry whether anything else was available. Yet, Mr. Tagliente doesn't really remember whether he specifically told Mr. Dufore about Mr. Wentworth's request. Instead, he believes Mr. Dufore was standing near by and heard Mr. Wentworth's request.

[17]Having found Mr. Wentworth generally credible, I rely to a great extent on Mr. Wentworth's undisputed recollection about the events of August 25, 2004.

back with another driver, leaving his truck and empty trailer in Agawam. Mr. Wentworth chooses to ride back with another driver. However, after a discussion with a federal representative, Mr. Wentworth decides not to ride with another driver with an overloaded trailer. Mr. Wentworth advises Mr. Salato of his decision to return with his truck and empty trailer. Mr. Wentworth then drives back to We Care.

August 26, 2004[18] In the morning of August 26, 2004, Mr. Tagliente writes a termination letter and has the day dispatcher tell Mr. Wentworth to come in and see him. In his office, Mr. Tagliente has Mr. Wentworth read the termination letter and directs him to turn in his company cell phone to the dispatcher downstairs. Mr. Wentworth leaves Mr. Tagliente's office, turns in his cell phone at the dispatcher's office and leaves. However, a few minutes later, Mr. Wentworth returns and angrily confronts Mr. Tagliente about his discharge, shaking a finger in Mr. Tagliente's face. Mr. Wentworth tells Mr. Tagliente that he has called DOT and Mr. Tagliente will lose his job. Shortly, thereafter, Mr. Wentworth calls OSHA to tell them he has been terminated.

January 2004 to September 2004 We Care drivers receive 70 overweight tickets. Due to these citations, the company pays over $60,000.

## Protected Activity

Having established the specific findings, I now address the first requisite element of protected activity. As previously mentioned, the STAA prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety.

First, under 49 U.S.C. § 31105 (a) (1) (A), an employee is protected if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. DOL interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints "is eminently reasonable." *Clean Harbors Environmental Services, Inc. v. Herman,* 146 F.3d 12 (1st Cir. June 10, 1998) (case below 95 STA 34). The U.S. Circuit Court of Appeals also stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id*. For example, a complainant's expressed preference to make shorter runs due to his inability to continue making longer trips like he could as a younger driver, in the absence of any stated safety-related concern, is not an STAA protected activity. *Barr v. ACW Truck Lines, Inc.*, 91 STA 42 (Sec'y Apr. 22, 1992). On the other hand, a complainant's motivation for making a safety complaint has no bearing on whether the complaint is a protected activity. *Nichols v. Gordon Trucking, Inc.* 97 STA 2 (ARB July 17, 1997).

[18]While the participants have slightly different versions of the events this day, their recollections are sufficiently similar such that I do not have to resolve the minor differences. Interestingly, Mr. Wentworth did not present any tape recordings of his exchanges with Mr. Tagliente on August 26, 2005.

Additionally, under 49 U.S.C. § 31105 (a) (1) (A), the complaint or concern need only "relate" to a violation of any commercial motor vehicle safety standard. Neither the Act nor the legislative history draw in the limitation in 49 U.S.C. § 31105 (a) (1) (B) (i) concerning a violation of a Federal safety standard. *See Nix v. Nehi-RC Bottling Company, Inc.*, 84 STA 1 (Sec'y July 13, 1984), slip op. at 8-9. In particular, complaints relating to alleged violations of Department of Transportation regulations constitute protected activities. *Hernandez v. Guardian Purchasing Co.,* 91 STA 31 (Sec'y June 4, 1002). Specifically, the operation of overweight trucks involves commercial motor vehicle safety. *See Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec'y Aug. 31, 1992). And, in light of 49 C.F.R. § 392.6,[19] exceeding applicable local speed limits involves a violation of a Federal motor carrier safety regulation. *Nolan v. A.C. Express,* 92 STA 37 (Sec'y Jan. 17, 1995).

Two additional types of employee activity are also protected under the STAA. Title 49 U.S.C. § 31105 (a) (1) (B) (i) provides protection for an employee who refuses to operate a vehicle in violation of any rules, regulations, standard, or orders of the United States applicable to commercial vehicle safety or health. And, 49 U.S.C. § 31105 (a) (1) (B) (ii) protects an employee who refuses to operate a commercial motor vehicle which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. The Secretary, through the Administrative Review Board ("ARB"), has determined that if an employee makes an objection regarding an unsafe condition and then actually drives the vehicle, the complaint should be more properly analyzed under the "complaint" provision of 49 U.S.C. § 31105 (a)(1)(A). *Zurenda v. J & K Plumbing & Heating Co., Inc*., 97-STA-16 (ARB, June 12, 1998). In addition, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 94 STA 55 (Sec'y Aug. 4, 1995). Further, although 49 U.S.C. § 31105 (a) (1) (B) (i) refers to Federal rules, regulations, and standards, the Administrative Review Board has concluded a refusal to drive in violation of local law is also covered by this section. *Beveridge v. Waste Stream Environmental, Inc.,* 97 STA 15 (ARB Dec. 23, 97). The Board reasoned that New York motor vehicle laws were incorporated by the U.S. Department of Transportation's regulation, 49 C.F.R. § 392.2, which requires every commercial vehicle to operate in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. *Id.,* slip op. 4. Specifically, refusal to drive an overweight truck is a protected activity. *Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec'y Aug. 31, 1992).

Based on the specific findings, and for the reasons set out below, I conclude that Mr. Wentworth engaged in STAA protected activities under: a) 49 U.S.C. § 31105 (a) (1) (A) by making internal commercial vehicle safety complaints to Mr. Tagliente on August 21 and 23, 2004; and, b) 49 U.S.C. § 31105 (a) (1) (B) (i) by refusing to haul a trailer for which he did not have an appropriate weight permit on August 25, 2004.

At the August 21, 2004 drivers' meeting. Mr. Wentworth made at least two assertions about We Care drivers' practices that directly involved violations of commercial motor vehicle

[19]According to 49 C.F.R. § 392.6, no motor carrier shall schedule a run or permit the operation of any commercial motor vehicle in a manner that would necessitate the vehicle "being operated at speeds greater than those prescribed by the jurisdiction in or through which the commercial motor vehicle is being operated."

safety regulations, standards and laws. First, Mr. Wentworth asserted that the company encouraged its drivers to pull loads which are overweight for permitted trailers under regulatory standards. The reasonableness and factual basis for that claim is clearly established by probative witness testimony and We Care's significant $60,000 nine month bill for overweight violations. Although Mr. Wentworth routinely hauled overweight trailers,[20] and his motivation in presenting that accusation appears to have been related to his displeasure with Mr. Tagliente's response to the concerns about the loss of income under the new rate schedule, the assertion nevertheless represents an accusation of unsafe vehicle operations by We Care drivers by hauling overweight loads. Pointedly, Title 17, New York Compilation of Rules and Regulations, Section 154-2.8 (c) (10), states that operation of a vehicle in excess of the weight ratings in the permit application is "per se unsafe."

Second, Mr. Wentworth complained that the various demands and constraints of the New York City route required him and other company drivers to exceed not only the permitted trailer speed limit of 55 miles per hour but also the un-permitted truck speed of 65 miles per hour. Again, while Mr. Wentworth regularly drove the route at 73 miles per hour and his comment was part of an exchange with Mr. Tagliente about the new rate schedule, his assertion still related to purported regular violations by We Care drivers of state and federal highway speed limits.

Although his two assertions were raised within the context of a group discussion about the new rate system, Mr. Wentworth's motivation for expressing his opinion does not alter either the safety-relatedness or protected nature of his concerns. Though apparently motivated by personal liability, Mr. Wentworth's further comments about the ramifications associated with overweight and speeding violations in the event of an accident highlight the commercial vehicle operation safety aspects of his two observations about the purported routine driving practices of We Care drivers.

On August 23, 2004, in a conversation with Mr. Tagliente, Mr. Wentworth again repeated his two assertions. In attempting to explain that he wasn't trying to cause trouble at the Saturday meeting, Mr. Wentworth stated he was just concerned about accident liability. To show that concern was viable, he again told Mr. Tagliente that We Care drivers were pulling illegal loads and he had to drive 73 miles an hour to complete the New York City run.

On August 25, 2004, upon arrival at Agawam, Mr. Wentworth refused to haul any of the pre-loaded trailers because he did not have the proper permit for any of the vehicles. He informed Mr. Salato, the We Care dispatcher, of his refusal, who confirmed the absence of any legal loads and in turn informed Mr. Tagliente about Mr. Wentworth's refusal. Because all of the trailers at Agawam exceeded Mr. Wentworth's permit, the act of hauling any of those trailers by Mr. Wentworth would have violated the New York state weight permit regulations. Consequently, since Mr. Wentworth refused to operate a vehicle in violation of the load permit limits established by the state of New York for commercial vehicles, his refusal to accept one of the preloaded trailers at Agawam was a protected activity under 49 U.S.C. § 31105 (a) (1) (B) (i).

[20]As Mr. Salato aptly commented on August 25, 2004 when Mr. Wentworth declined to haul a trailer for which he was not permitted, "You never had any problem before."

## Adverse Personnel Action

Having engaged in protected activities, Mr. Wentworth must next prove that he suffered an adverse personnel action. The Act prohibits an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment because he or she engaged in a protected activity. 49 U.S.C. § 31105 (a) (1). Since the August 22, 2004 change in route assignment lead to a loss of pay, it represents an adverse action. In addition, on August 26, 2004, Mr. Wentworth experienced the definitive adverse personnel action when Mr. Tagliente terminated his employment as a driver for We Care.

## Causation

Having engaged in protected activities and suffered adverse personnel actions, Mr. Wentworth must also prove by a preponderance of the evidence a causal connection between his protected activities and the unfavorable personnel actions. That is, Mr. Wentworth must prove that his complaints about overweight loads and speeding and refusal to haul an overweight trailer, were contributing factors in the change of route assignment on August 22, 2004 and termination of employment on August 26, 2004. The Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice,* 2 F.3d 1137 (Fed. Cir. 1993). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, the respondent must have been aware of the protected activity (knowledge) and then taken the adverse personnel action in part due to that knowledge (causation).

### *Knowledge*

The knowledge element is readily established by the evidence. Both Mr. Dufore, who changed the route assignment, and Mr. Tagliente, who terminated Mr. Wentworth, were directly aware of Mr. Wentworth's protected activities. Even considering his diminished credibility, Mr. Dufore recalled hearing Mr. Wentworth's comments on August 21, 2004 about overweight trailers. And, the preponderance of the more probative evidence establishes that Mr. Wentworth presented his overweight and speeding concerns directly to Mr. Tagliente and that Mr. Tagliente was aware of Mr. Wentworth's refusal to haul an overweight trailer in violation of his weight permit.

### *Causation*

#### Route Reassignment

In summary, on August 21, 2004, Mr. Wentworth raised concerns about pulling overweight loads and speeding on the New York City route. The next day, August 22, 2004, Mr. Dufore changed Mr. Wentworth's next driving assignment from the previously scheduled New York City route to a run to Agawam. In subsequent statements and his testimony, Mr. Dufore indicated the change was made to accommodate Mr. Wentworth's August 21, 2004 request for a shorter route. Similarly, Mr. Tagliente also asserted that the route change occurred because Mr.

Wentworth made a request for a route change after the August 21, 2004 drivers' meeting. However, readily apparent in light of my previous credibility determinations, I find the explanations by Mr. Dufore and Mr. Tagliente to be pretext.

As previously discussed, Mr. Dufore's testimony on this subject is not credible. Not only are his investigative and litigation explanations inconsistent with the explanations he actually gave to Mr. Wentworth on August 23, 2004, even his initial response to Mr. Wentworth's inquiry about the change – "there just wasn't a load" – was evasive. For similar reasons, Mr. Tagliente's explanation that the route change was made at Mr. Wentworth's request is not believable. Notably, in his initial response to Mr. Wentworth, Mr. Tagliente presented the reduction in landfill loads as the reason in the route change. Later in the day on August 23, 2004, Mr. Tagliente informed Mr. Wentworth that Mr. Dufore made the change due to Mr. Wentworth's complaints at the drivers' meeting. I have considered that the referenced complaints may have been Mr. Wentworth's comments about the length of the New York City route. However, had those complaints actually related to a request by Mr. Wentworth to change his route, Mr. Dufore could have reasonably been expected to tell Mr. Wentworth that was the reason when first asked on August 23, 2004. Likewise, in his cell phone call, Mr. Tagliente would have identified a route change request rather than "complaints." Thus, I conclude the complaints Mr. Tagliente referenced involved Mr. Wentworth's concerns about overweight trailers and speeding. In other words, in his cell phone call to Mr. Wentworth, Mr. Tagliente was being fairly accurate.

Consequently, due to the pretext presented by Mr. Dufore and Mr. Tagliente and the exceptionally close temporal proximity between the protected activities and the adverse personnel action, I find that Mr. Dufore impermissibly changed Mr. Wentworth's route assignment on August 22, 2004 due to his STAA protected activities the night before.

Termination

To review, on August 21 and 23, 2004, Mr. Wentworth presented assertions to Mr. Tagliente that We Care drivers were hauling overweight trailers and speeding. On August 25, 2004, Mr. Wentworth informed the We Care dispatcher Mr. Salato, that there were no available trailers at Agawam for him to pull under his permit. Mr. Salato confirmed the absence of any legal loads. Mr. Tagliente eventually became involved and gave Mr. Wentworth two options. Mr. Wentworth then told Mr. Tagliente that he would ride back with another driver. However, Mr. Wentworth later changed his mind and drove his tractor and empty trailer back to We Care without informing Mr. Tagliente. On August 26, 2004, Mr. Tagliente terminated Mr. Wentworth's employment.

In assessing whether any, or all, of Mr. Wentworth's protected activities caused his termination, I first note that Mr. Tagliente had a legitimate reason to respond Mr. Wentworth's unilateral decision to return to We Care with an empty trailer without telling Mr. Tagliente. During their conversation, Mr. Tagliente and Mr. Wentworth agreed on what he was going to do. Mr. Wentworth then changed that agreement without telling Mr. Tagliente. Mr. Wentworth's unannounced and unilateral decision disrupted scheduling since his truck and empty trailer were no longer in Agawam as expected and cost about $600 in unproductive overhead. Under those

circumstances, Mr. Tagliente's dissatisfaction with Mr. Wentworth's decision not to call him[21] about the change in plans is reasonable, especially considering, as Mr. Tagliente accurately noted, Mr. Wentworth was carrying a company two-way cell phone.[22]

Considering that a legitimate basis existed for a disciplinary response, my analysis becomes whether Mr. Wentworth's protected activities played a role in Mr. Tagliente's selection of employment termination as the response to Mr. Wentworth's unapproved return to We Care with an empty trailer.

Mr. Tagliente has vehemently denied that any of the concerns Mr. Wentworth expressed on August 21 and 23, 2004 or his refusal to take a trailer on August 25, 2004 played any role in his decision to terminate Mr. Wentworth. According to Mr. Tagliente, he terminated Mr. Wentworth for the following reasons: a) without permission, he returned to We Care with an empty trailer; b) his unproductive return trip with an empty trailer cost We Care $600; and, c) Mr. Wentworth's failure to advise Mr. Tagliente of his change of their agreement of what he was going to do was gross insubordination and represented total disrespect toward Mr. Tagliente.

My ability to believe Mr. Tagliente's apparently strongly held denial is of course adversely affected by my previous determination that he has diminished credibility. Thus, the probative value of his direct denial has less probative weight than the strong circumstantial evidence established by the nearly contemporaneous timing between Mr. Wentworth's refusal to haul an illegal trailer on August 25, 2004 and his employment termination the next day.

Significantly, however, my causation resolution doesn't solely hinge on the probative balancing of Mr. Tagliente's diminished credibility with the circumstantial evidence in this case. In considering Mr. Tagliente's stated reasons for terminating Mr. Wentworth, I find significant disparities between the discipline he selected for Mr. Wentworth and his disciplinary responses for other drivers who committed not only similar, but also more grievous omissions and offenses.[23] The readily discernible disparate treatment of Mr. Wentworth becomes even more stark in light of a) Mr. Tagliente's acknowledgement that up until the last few days of his employment in August 2004 Mr. Wentworth had been a good, reliable driver; and, b) Mr. Tagliente's demonstrated usual approach of applying the We Care's graduated disciplinary approach of warning, probation, suspension, and termination, coupled with the forfeiture of safety bonuses.

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[21]Mr. Wentworth indicated he informed Mr. Salato about the change in plans and he asserted that on August 26, 2004 Mr. Tagliente acknowledged the night dispatcher had told him of the change in plans. On this point, I simply note that Mr. Tagliente's focus is on Mr. Wentworth's failure to discuss the change with him.

[22]From Mr. Wentworth's perspective, the absence of a phone call to Mr. Tagliente becomes somewhat understandable considering the reason Mr. Wentworth changed his mind was his subsequent conversation with a transportation official, who advised Mr. Wentworth not to ride back in an overweight vehicle.

[23]Since We Care did not contest the accuracy of the disciplinary letters and safety bonus notices and Mr. Tagliente did not challenge their contents during his hearing testimony, I accept as established the factual details set out in the respective letters.

Contrary to Mr. Tagliente's hearing recollection, he has dealt with other drivers who returned to the yard with empty trailers. In December 2004, when driver failed to properly check his paperwork, he hauled an empty trailer to We Care. Citing the unproductive overhead costs, Mr. Tagliente forfeited $500 of the driver's safety bonus. Additionally, the company's operation manager, Dr. Dufore, also acknowledged that a driver wouldn't ordinarily get fired for driving a trailer back empty.

Concerning the $600 overheard cost associated with Mr. Wentworth's return trip, several drivers have cost We Care much more and kept their jobs. In December 2004, after incurring two accidents costing $8,000 and $1,200 due to losing control of his truck, a driver only lost his annual safety bonus. In August 2003, after a driver with a record of a previous of accident costing $4,500, had a second accident, Mr. Tagliente forfeited the driver's annual safety bonus, suspended him for three days and placed him on 90 days probation. The driver was also warned that the next incident would be grounds for immediate termination.

In regards to drivers doing what they want to instead of doing what they'd been told – in other words, cases of insubordination, on several occasions, Mr. Tagliente did not resort to termination. Instead, Mr. Tagliente stressed his displeasure with "gross" insubordination through warning letters and probation. The We Care disciplinary files confirm that Mr. Tagliente did not respond to first time insubordination with immediate termination. For example, in June 2002, when two drivers chose not to follow dispatcher instructions and took different routes, incurring additional transportation costs, Mr. Tagliente issued warning letters and suspended the drivers for one day, citing gross disrespect and insubordination. During the same period, in response to a driver's refusal to accept an additional driving assignment, Mr. Tagliente forfeited his monthly safety bonus and issued a warning, characterizing his refusal as gross disrespect and insubordination. In December 2003, due to being late without notice and lying about his loading difficulties, a driver received an insubordination letter from Mr. Tagliente. Referencing the offenses as "total insubordination" and highlighting the lies, Mr. Tagliente told the driver that any further incidents would be grounds for suspension, "which will lead to termination."

Notably, Mr. Tagliente routinely took several less severe disciplinary actions prior to termination. In November 2002, Mr. Tagliente fired a driver for damaging his truck due to inappropriate operation. A few months earlier, the driver had received a final warning letter for continued problems with equipment. In January 2003, Mr. Tagliente gave a driver a final warning letter threatening termination for the next offense because he had refused a driving assignment. At the time, the driver was already on six month probation. In October 2003, following a driver's third sludge spill in two years, Mr. Tagliente forfeited $500 of the driver's safety bonus and placed her on six month probation.

Clearly, based on Mr. Tagliente's disciplinary actions with other drivers, none of the cited reasons for Mr. Wentworth's termination – $600 overhead cost, return with an empty trailer, and gross insubordination – would typically warrant immediate discharge. Other drivers who committed similar breaches in driver conduct were given second, and more, chances to correct their behavior. I have considered that perhaps the combination of all three elements in Mr. Wentworth's case warranted termination. However, the principal reason Mr. Tagliente stressed in explaining his decision was Mr. Wentworth's failure to personally communicate with

him. Yet, Mr. Wentworth's communication transgression pales in comparison to some of the first time offenses by We Care drivers that did not result in immediate termination. Thus, within the context of Mr. Tagliente's treatment of other driver discipline problems and the absence of any prior disciplinary issue in Mr. Wentworth's driving record with We Care, Mr. Tagliente's explanation does not survive close scrutiny. In contrast to the other drivers' offenses, Mr. Wentworth's first time omission of failing to personally call Mr. Tagliente prior to his return to We Care did not rationally warrant Mr. Tagliente's abandonment of the customary graduated disciplinary actions and his resort to immediate discharge. As a result, I find Mr. Tagliente's stated justifications for his discharge decision to be pretext.

Perhaps, the taped exchange between Mr. Tagliente and Mr. Wentworth provides additional understanding of Mr. Tagliente's response to Mr. Wentworth's refusal to drive. On August 23, 2004, after Mr. Wentworth again noted his liability concern in the event he was involved in an accident while hauling an overweight trailer or speeding, Mr. Tagliente essentially observed that an enforcement buffer zone exists in terms of exceeding load and speed limits. Though Mr. Tagliente did not tell Mr. Wentworth that he should pull overweight trailers or speed, he noted that while the laws are written one way, "everybody cheats." He further indicated that if Mr. Wentworth was still concerned then he might be in the wrong business. At that time, Mr. Wentworth assured Mr. Tagliente that he liked his We Care driving job, did not mean to cause problems, and asked to return to the New York route. Yet, despite his assurances, two days later, Mr. Wentworth refused to haul an overweight load – in other words, cheat.[24] Thus, when Mr. Wentworth also failed to properly inform Mr. Tagliente of his change in mind and drove back with an empty trailer, Mr. Tagliente had a pre-existing motivation to move Mr. Wentworth out of the We Care driving business at that time without the usual preliminary steps of a warning letter, probation, and suspension.

In summary, although Mr. Tagliente had a legitimate reason to respond to Mr. Wentworth's decision to return on August 25, 2004 with an empty trailer, I find that his stated reasons for selecting termination, rather than the usual lesser forms of discipline are pretextual. Accordingly, based circumstantial evidence of causation produced through the close temporal proximity between the protected activities and the August 26, 2004 adverse personnel action, and considering Mr. Tagliente's diminished credibility, his singular disparate response to Mr. Wentworth's return, and the pretextual explanations, I specifically find that in violation of the employee protection provisions of STAA, Mr. Tagliente terminated Mr. Wentworth's employment on August 26, 2004 due to his STAA protected activities on August 21, 23 and 25, 2004.[25]

[24]Interestingly, although not a protected activity, Mr. Wentworth also did not accept the option to make a New York City run, just two days after asking Mr. Tagliente to be put back on the route. On this point, I believe Mr. Tagliente's comment that in the few days before the termination, he really didn't know what Mr. Wentworth's problem was.

[25]To the extent this situation may be considered a dual motive case, my disparate treatment analysis demonstrates that the Respondent would hardly be able to establish that in the absence of his protected activities, Mr. Wentworth would still have been terminated on August 26, 2004.

## DAMAGES

Through the preponderance of the more probative evidence, Mr. Wentworth has proven that We Care engaged in two acts of illegal discrimination under the STAA. First, due to his concerns about hauling overweight trailers and speeding on August 21, 2004, the We Care Operations Manger, Mr. Dufore, reassigned Mr. Wentworth to a lesser-paying route. Second, due to his assertions on August 21 and 23, 2004 about driving overweight trailers and speeding and his refusal to haul any trailer from Agawam for which he was not permitted on August 25, 2004, the We Care general manager, Mr. Tagliente, terminated Mr. Wentworth's employment on August 26, 2004.

Having suffered two specific acts of illegal employment discrimination for STAA protected activities, Mr. Wentworth is entitled to specific relief to remedy the harm caused by the discrimination. According to 49 U.S.C. § 31105 (b) (3) (A), as implemented by 29 C.F.R. § 1978.109, the appropriate remedies include immediate reinstatement of the complainant with the same pay and privileges of employment; compensatory damages, which include back pay; prejudgment interest; and costs and expenses, including reasonably incurred attorney fees. *See Drew v Alpine, Inc.,* 01 STA 47 (ARB Jan. 25, 2002) and 29 C.F.R. § 1978.109 (a).

### Reinstatement

As mandated by 29 C.F.R. § 1978.109 (b), a complainant's reinstatement is effective immediately upon receipt of an administrative law judge's decision by the respondent. Although the regulation states that an administrative law judge "may" order reinstatement, the ARB has held that reinstatement is normally mandatory except in circumstances such as where the parties have demonstrated the impossibility of a productive and amicable working relationship, or where the company no longer has positions for which the complainant is qualified. *See Dale v. Step 1 Stairworks, Inc*., 02-STA-30 (ARB Mar. 31, 2005).

Accordingly, since Mr. Tagliente's termination of Mr. Wentworth's employment on August 26, 2004 violated the STAA employee protection provisions, We Care must now reinstate Mr. Wentworth in his former job as an over-the-road driver. In regards to pay, terms, and privileges of employment, We Care shall compensate Mr. Wentworth at the rate of pay and provide the appropriate other privileges and conditions of employment as if he had remained a driver with the company since August 26, 2004. To the extent the New York City route remains available, We Care shall provide Mr. Wentworth the same opportunity to participate in that route as he had prior to August 21, 2004, and comparable to other company drivers similarly situated. Mr. Wentworth's reinstatement as a We Care driver is effective upon We Care's receipt of this Recommended Decision and Order.

### Compensatory Damages

#### Loss of Pay

On August 22, 2004, when Mr. Dufore reassigned Mr. Wentworth from the New York City route to the Agawam route, Mr. Wentworth suffered a loss of pay when he drove the route

on August 23, 2004. According to Mr. Wentworth, his loss of pay for that trip was $100. Mr. Dufore indicated that the rate for the Agawam run was $143; whereas, the rate system in place for New York City route in August 2004 paid $232 to $260 for loads over 32 tons and $202.50 if the load was under 32 tons. Since Mr. Wentworth was not permitted for 32 tons, the lower rate of $202.50 would apply. As a result, the loss of pay according to Mr. Dufore would have been $59.50 ($202.50 – 143).

In resolving this $ 40.50 disagreement, I first conclude that Mr. Wentworth was recalling an estimate. On the other hand, Mr. Dufore specifically recalled the actual compensation rates that would have affected Mr. Wentworth and his recollection was corroborated by the company's published rate schedule for the New York City run. As a result, I find that Mr. Wentworth suffered a loss of pay in the amount of $59.50 when in violation of the STAA employee protection provisions Mr. Dufore reassigned Mr. Wentworth to the Agawam route due to his protected activities.

**Back Pay**

To make a person "whole for injuries suffered for past discrimination," the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated or obtains comparable employment. *Nelson v. Walker Freight Lines, Inc*. 87 STA 24 (Sec'y Jan. 15, 1988), slip op. at 5, *Polwesky v. B & L Lines, Inc.*, 90 STA 21 (Sec-y May 29, 1991), *Moravec v. HC & M Transportation, Inc*., 90 STA 44 (Sec'y Jan. 6, 1992), and *Polgar v. Florida Stage Lines*, 94 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc*., 95 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc*., 90 STA 37 (Sec'y June 3, 1994) and *Kovas v. Morin Transport, Inc*., 1992 STA 41 (Sec'y Oct. 1, 1993). At the same time, the lost wages claimed as back pay must have been caused by the employer's misconduct. *Hampton v. Sharp Air Freight Service, Inc*., 1991 STA 49 (Sec'y July 24, 1992).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Corp. Serv. Co*., 86 STA 24 (Sec'y June 28, 1991). Concerning interim earnings, the deduction is warranted only if the complainant could not have obtained the interim earnings if his employment with the respondent had continued. *Nolan v. AC Express*, 92 STA 37 (Sec'y Jan. 17. 1995).

The burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky*, 90 STA 21, citing *Carrero v. N.Y. Hous. Auth*., 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant's favor, *Moyer v. Yellow Freight System, Inc*. 1989 STA 7 (Sec'y Aug. 21, 1995), the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 90 STA 21. The reasonableness of the effort to find substantially

equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131 (6th Cir. Apr. 24, 1997)(unpublished decision available at 1997 U.S. App. LEXIS 9044) (case below 94 STA 22).

Initially addressing the issue of mitigation, Mr. Wentworth testified that after a few unsuccessful inquiries and his work in Florida, he became a tow truck driver. We Care essentially asserts that effort was insufficient and no back pay award is warranted because Mr. Wentworth did not mitigate his damages. According to Mr. Dufore, six or seven trucking companies operate in the local area. As a result, We Care faces stiff competition for truck drivers. Further, Mr. Tagliente testified that until the few days before his termination, Mr. Wentworth had been a good reliable driver. The implication from that testimony is that Mr. Wentworth could have easily found a comparable job with another company. However, I find Mr. Dufore's generalized representation insufficient to meet the Respondent's burden of showing that a viable employment market for Mr. Wentworth's skills existed in the local community and job opportunities were available, such that he could have obtained a comparable job elsewhere following his termination.

Since the Respondent has failed to demonstrated that Mr. Wentworth failed to mitigate his damages, Mr. Wentworth is entitled to a compensatory award of back pay. CX 32 contains Mr. Wentworth's biweekly pay summaries for We Care as follows:

| Pay Period Ending Date | Gross Pay |
|---|---|
| August 28, 2004 | $1,074 |
| August 14, 2004 | 1,560 |
| July 31, 2004 | 2,360 |
| July 17, 2004 | 1,847 |
| July 3, 2004 | 1,746 |
| June 19, 2004 | 1,457 |
| June 5, 2004 | 1,453 |
| May 22, 2004 | 1,330 |
| May 8, 2004 | 960 |
| April 30, 2004 | 1,597 |
| April 16, 2004 | 2,150 |
| March 27, 2004 | 2,437 |
| March 13, 2004 | 2,212 |
| February 28, 2004 | 2,021 |
| February 14, 2004 | 2,030 |
| January 31, 2004 | 1,033 |
| January 17, 2004 | 806 |
| | $28,073 |

Due the varying amounts of the biweekly gross pay, I believe the most reasonable means to determine Mr. Wentworth's pay at the time of his termination is the average biweekly gross pay from January through August 2004, which is $1,651 ($28,073/17).

Following his employment discharge on August 26, 2004 until his employment as a tow truck driver at the beginning of December 2004, Mr. Wentworth suffered a loss of truck driving wages for 13 weeks, in the amount of $10,732 ($1,651 x 6.5 biweekly periods).

From the end of September 2004 through November 25, 2004 (Thanksgiving), Mr. Wentworth worked in Florida picking up hurricane debris. According to Mr. Wentworth, CX 45 shows his typical weekly gross pay of $1,200.[26] Had Mr. Wentworth continued to work as a We Care truck driver, he would not have been able to take this job in Florida. Consequently, the money he earned for eight weeks in Florida, $9,600 ($1,200 x 8 weeks), is interim earnings which must be deducted from his loss of pay from the end of August until December 1, 2004.

Taking the interim earnings into account, Mr. Wentworth's back pay for the period August 26, 2004 to December 1, 2004 is $1,132 ($10,732 – 9,600).

Starting in December 2004, Mr. Wentworth became a tow truck driver for Pullens Truck Center, making $9 an hour, plus a 25% commission. According to Mr. Wentworth, CX 46 represents his typical biweekly pay. CX 46 shows a biweekly gross pay of $905 for 58.85 hours of work. Since this biweekly gross pay is less than the amount Mr. Wentworth received from We Care, his pay back compensation must also include the difference in his biweekly gross pay, which is $746 ($1,651 – 905).

At the hearing, Mr. Wentworth indicated that his hourly rate has now increased to $10 an hour, which for a typical biweekly period of 58.85 hours represents an increase of $58.85 in his tow driver pay and a corresponding drop in the biweekly back pay compensation of $58.85, down to $687.15 ($746 – 58.85). Since Mr. Wentworth did not indicate when the $10 hourly rate increased, I will use the date of the hearing, May 4, 2005 as the effective date for the reduction in the amount of biweekly back pay award to $687.15.

In summary, Mr. Wentworth's compensatory award of back pay as of the date of this decision consists of the following:

| | |
|---|---|
| 1. August 26 to December 1, 2004 | $ 1,132 |
| 2. December 1, 2004 to May 4, 2005 (11 biweekly periods x $746) | 8,206 |
| 3. May 4, 2005 to April 4, 2006 (24 biweekly periods x $687.15) | 16,492 |
| | $25,830 |

Finally, the biweekly back pay award of $687.15 continues from April 4, 2006 until Mr. Wentworth's reinstatement or the date of a bona fide offer of reinstatement.

**Mental and Emotional Distress**

As part of compensatory damages, a successful whistleblower complainant may recover for mental and emotional distress suffered as a consequence of the discrimination. *Doyle,* 89 ERA 22 (ARB May 17, 2000). To establish entitlement, the Complainant must show that he suffered mental and emotional distress and that the respondent's adverse action caused the

[26]Mr. Wentworth was making $30 an hour.

distress. *Id.* Consulting a physician, psychologist or similar professional on a regular basis is not a prerequisite to entitlement. *Smith v. Littenberg,* 92 ERA 52 (Sec'y Sep. 6, 1995), *appeal dismissed,* No. 95070725 (9th Cir. Mar. 27, 1996). At the same time, the complainant must prove the existence and magnitude of subjective injuries with competent evidence. *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), *citing Carey v. Piphus,* 435 U.S. 247, 264 n. 20 (1978). In determining the amount of compensation for mental and emotional distress, an administrative law judge may review other types of wrongful employment termination cases for assistance. *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery,* 95 STA 37 (ARB Sept. 5, 1996).

Mr. Wentworth specifically seeks compensation for the "unbelievable" stress and physical symptoms that he developed after his termination which included "heart pounding" and "nerves" and an occasional inability to fall asleep quickly. Although the amount of the appropriate compensation is left to my discretion, Complainant's counsel noted judicial awards of $100,000 for such injuries have been upheld.

As directed by *Bigham,* I have reviewed several wrongful employment termination cases. One particular case, *McCuistion v. Tennessee Valley Association,* 89 ERA 6 (Sec'y Nov. 13, 1991) contains a fairly detailed discussion on mental and emotional distress compensatory awards ranging from $10,000 to $50,000. In that case, after reviewing several cases, the Secretary awarded $10,000 for mental and emotional distress where the record established the complainant had been embarrassed and humiliated before fellow employees; experienced sleeplessness; suffered severe headaches, depression, stomach problems and aggravation of pre-existing hypertension; and, consequently experienced difficulty in trying to obtain other employment. In another case, *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), the complainant also received $10,000 for mental and emotional distress. In that case, for over five months after his discharge, the complainant struggled with depression, contemplated suicide, withdrew from family and friends, and developed significant interpersonal relationship problems. Finally, in *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*¸ 95 STA 34 (ARB Aug. 8, 1997), the Board upheld an award of $30,000 for a complainant who as a result of his unlawful termination suffered severe emotional distress associated with a forced relocation, concerns for his family's survival, marital difficulties, and an on-going ulcer.

Since I found Mr. Wentworth to be a credible witness, I believe he has suffered some mental and emotional distress as a result of his employment termination by We Care. Additionally, the absence of any medical treatment for such symptoms is partially understandable due to a lack of health insurance. However, while he testified about some generalized symptoms, Mr. Wentworth provided little information about the depth, duration, and frequency of his mental and emotional distress and the associated physical manifestations. Other than an inability to fall asleep quickly, I have no indication how his mental strife and physical complications of nerves and occasional heart pounding adversely affected his life and ability to work. Notably, while struggling with mental and emotional distress, Mr. Wentworth was nevertheless able to go to Florida and engage in the strenuous work of hurricane debris removal for two months. Likewise, Mr. Wentworth has been able to return to commercial truck driving as a tow truck driver. In comparison to the other cases involving prolonged depression and

social dysfunction, Mr. Wentworth's mental and emotional distress does not rise to the level of seriousness or intensity that warrants a significant compensatory award of $10,000 to $100,000. Instead, I conclude that an award of $1,000 for Mr. Wentworth's mental and emotional distress is appropriate.

**Prejudgment Interest**.

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages. *Hufstetler v. Roadway Express, Inc.* 85 STA 8 (Sec'y Aug. 21 1986), *overruled on other grounds, Roadway Express, Inc. v. Brock,* 830 F.2d 179 (11th Cir. 1987). In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking,* 03 STA 36 (ARB June 30, 2005) and 26 U.S.C. § 6621 (a) (2). The interest is compounded quarterly, until the damage award is paid. *Bryant,* slip op. at 10, and *Doyle v. Hydro Nuclear Servs.,* 89 ERA 22, slip op. at 18-19 (ARB May 17, 2000),[27] *rev'd on other grounds, Doyle v. U.S. Secretary of Labor,* No. 00-1589 and 00-2035 (3d Cir. May 27 2002).[28]

In light of the above principals, Mr. Wentworth is entitled to prejudgment interest on his back pay award. The interest will be calculated in accordance with 26 U.S.C. § 6621 (a) (2) and compounded quarterly.

**Attorney Fees**

Due to the successful prosecution of his STAA discrimination claim, Mr. Wentworth is entitled to recover the associated litigation expenses, including reasonable attorney fees. As requested by Mr. Wentworth, I will give his counsel an opportunity to submit an attorney fee petition within 30 days of receipt of this Recommended Decision and Order. The Respondent will have up to 21 days from receipt of the attorney fee petition to file a response.

[27]The machinations associated with this calculation are not insignificant and I leave the particulars to parties' counsel. For the first calendar quarter following August 2004, the "applicable federal rate" (AFR") for that calendar quarter must be determined by averaging the Federal short-term rate for each of the three months in that quarter. Next, that average interest rate is arithmetically rounded and 3% is added. Then, that combined interest is then applied to the quarter's principal. To determine the interest owned on the second calendar quarter, after determining the combined interest rate for the second quarter, the first quarter principal, the first quarter interest and second quarter's principal are added and the second quarter compound interest is applied to that sum. Finally, the iterations continue for each quarter until the damage payment is made.

[28]The text of the appellate court's decision may be found on the Office of Administrative Law Judges website, www.oalj.dol.gov in the whistleblower library associated with the administrative law judge and ARB decisions for 1989 ERA 22.

## ORDER

1. Effective immediately upon receipt of this Recommended Decision and Order, the Respondent, WE CARE TRANSPORTATION, LLC, **SHALL REINSTATE** the Complainant, MR. KENNETH J. WENTWORTH, as an over-the-road truck driver at the same pay, and with the same terms, privileges, and conditions of employment that would be applicable if he had remained a driver with the company since August 26, 2004.

2. The Respondent, WE CARE TRANSPORTATION, LLC, **SHALL PAY** the Complainant, MR. KENNETH J. WENTWORTH, compensatory damages in the amount of $59.50 for loss of pay on August 23, 2004.

3. The Respondent, WE CARE TRANSPORTATION, LLC, **SHALL PAY** the Complainant, MR. KENNETH J. WENTWORTH, compensatory damages in the amount of $25,830 for back pay, and continuing from April 4, 2006 at the biweekly rate of $687.15, until the date of reinstatement or bona fide offer of reinstatement.

4. The Respondent, WE CARE TRANSPORTATION, LLC, **SHALL PAY** the Complainant, MR. KENNETH J. WENTWORTH, compensatory damages in the amount of $1,000 for mental and emotional distress.

5. The Respondent, WE CARE TRANSPORTATION, LLC, **SHALL PAY** the Complainant, MR. KENNETH J. WENTWORTH, prejudgment interest, compounded quarterly in accordance with 26 U.S.C. § 6621 (a) (2).

6. The Complainant, MR. KENNETH J. WENTWORTH, may file a petition for reasonable attorney fees within 30 days or receipt of this Recommended Decision and Order. The Respondent, WE CARE TRANSPORTATION, LLC, may provide a response to the Complainant's attorney fee petition up to 21 days after receipt of the petition.

**SO ORDERED**:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: April 4, 2006
Washington, D.C.

**NOTICE OF REVIEW**: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in

opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109 (c) (2). All further inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).